85-1116

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

No. _____

In the Supreme Court of the United States

October Term, 1985

THE CITY OF WHITTIER, a Charter City, *et al.*,

Appellants,

v.

WALNUT PROPERTIES, INC., a California corporation,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

APPENDIX TO JURISDICTIONAL STATEMENT

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WALNUT PROPERTIES, INC., a California Corporation, and VINCENT MIRANDA, an individual, Plaintiffs-Appellees, v. CITY OF WHITTIER, a Charter City; M.D. KLAXTON, R.L. HENDERSON, L.A. STRONG, GENE CHANDLER, V.A. LOPEZ, as Members of the Whittier City Council; JAMES BALE, as Chief of Police of the City of Whittier; and JOHN ROBERT FLANDRICK, as City Attorney of the City of Whittier, Defendants-Appellants.	Nos. 84-5755, 84-6087 D.C. No. CV 81-2262-R AMENDED MEMORANDUM*

FILED
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CLERK, U.S. COURT OF APPEALS

On appeal from the United States District Court
for the Central District of California
Hon. Manuel L. Real, District Judge, presiding

Argued and submitted —
February 8, 1985, Pasadena, California

*The panel has concluded that the issues presented by this appeal do not meet the standards set by rule 21 of the rules of this court for disposition by written opinion. Accordingly, it is ordered that disposition be by memorandum, forgoing publication in the *Federal Reporter*, and that this memorandum may not be cited to or by the courts of this circuit save as provided in rule 21(c).

Before: BOOCHEVER and BEEZER, Circuit Judges and SOLOMON,** District Judge.

The City of Whittier (City) appeals a declaration that its zoning ordinance is unconstitutional. It also asserts the action below was barred by the doctrine of res judicata. The state action to which it refers did not result in a final judgment; therefore, res judicata does not apply. The ordinance violates the first amendment because it was not shown to justify legitimate government needs, because it severely restricts protected speech and because one of the City's reasons for enacting the ordinance was to suppress that speech. The district court's award of attorneys' fees to appellee was not an abuse of discretion.

Discussion

A. Res Judicata

In its opening brief, the City argues, without distinguishing them, that the doctrines of res judicata (or claim preclusion) and collateral estoppel (or issue preclusion) barred the district court suit. The two will be dealt with separately.

Res judicata bars a party from relitigating not only issues actually decided in a prior suit but also all those stemming from the same cause of action. *See, e.g., Los Angeles Branch NAACP v. Los Angeles Unified School District,* No. 81-5772, slip op. at 8 (9th Cir. Feb. 21, 1985) (en banc); 18 C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 4406 & n.4 (1981) [hereinafter cited as Wright, Miller & Cooper]. Federal courts must accord a state court judgment the same preclusive effect the judgment would receive in the courts of that state. 28 U.S.C. § 1738 (1982); *Migra v. Warren*

**Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

City School District Board of Education, ___ U.S. ___, 104 S. Ct. 892, 896-98 (1984); *Los Angeles NAACP,* slip op. at 8. In California, subsequent litigation is precluded 1) between the same parties, 2) on the same cause of action, if 3) "the first suit concluded in a final judgment on the merits." *Los Angeles NAACP,* slip op. at 8 (citing *Agarwal v. Johnson,* 25 Cal. 3d 932, 954, 603 P.2d 58, 72, 160 Cal. Rptr. 141, 155 (1979); *Slater v. Blackwood,* 15 Cal. 3d 791, 795, 543 P.2d 593, 594, 126 Cal. Rptr. 225, 226 (1975)). Plaintiff Walnut Properties, Inc. does not dispute that the first two requirements are satisfied here.

But no final judgment has issued from the state courts on whether Ordinance No. 2257 is constitutional as applied. The second state appellate decision did not purport to determine this question. *See* 149 Cal. App. 3d 633, 642, 197 Cal. Rptr. 127, 133 ("*If* [it] does not prevent the entry of new theatres into the market place, the ordinance is not unconstitutional as applied") (emphasis supplied; citation omitted). Instead it remanded to the state trial court. *Id.* The City's assertion that the state appellate court "decided the Ordinances were constitutional in all respects" is most charitably deemed wishful thinking. Federal law is clear that no preclusive effect is given when the appellate court reverses the trial court and remands for further proceedings, but no remand hearing is held. *E.g., Aurora City v. West,* 74 U.S. (7 Wall.) 82, 93 (1868) (where judgment for plaintiff was reversed and remanded, defendant could not invoke res judicata); *Los Angeles NAACP v. Los Angeles Unified School District,* 518 F. Supp. 1053, 1058-59 (C.D. Cal. 1981), *rev'd on other grounds,* No. 81-5772; *see also* Wright, Miller & Cooper, *supra,* §4432, at 302-04 & n.22 ("If the matter is dropped after remand without proceeding to a new final judgment, there is no preclusion at all.").

B. Collateral Estoppel

Collateral estoppel or issue preclusion is a distinct doctrine from res judicata. It prevents 1) the same parties from relitigating 2) the same issue of fact or law which was actually litigated previously 3) after a full and fair opportunity to litigate 4) which resulted in a final judgment on the merits. *See, e.g.,* Wright, Miller & Cooper, *supra*, § 4416; *see generally Bernhard v. Bank of America National Trust & Savings Association,* 19 Cal. 2d 807, 810, 122 P.2d 892, 894 (1942).

Of the three factual issues on appeal, the state courts have clearly not decided whether alternative sites exist for the Wardman Theatre in Whittier and have apparently not decided whether the ordinances were motivated by a desire to restrict speech. (In its first, vacated opinion, the appellate court had based its finding that the ordinance was not unconstitutionally motivated on its "finding" that alternative sites were available to Walnut. It did not comment on the motivation issue in its second opinion.) The district court was not estopped from deciding these issues. *See Bleeck v. State Board of Optometry,* 18 Cal. App. 3d 415, 429, 95 Cal. Rptr. 860, 869 (1971).

Although the language it used is somewhat ambiguous, we do not believe the state appellate court decided whether the City had narrowly tailored the ordinance to a compelling government need.

> In assessing the reasonableness of a regulation we must weigh heavily the facts and the communication involved; the regulation must be narrowly tailored to further the state's legitimate interest. To be reasonable, time, place and manner restrictions must not only serve significant state interest but must leave

> open adequate alternative channels of communication. . . .
>
> In the case at bench, the zoning ordinance . . . is reasonable as to time, place and manner if it leaves open alternative channels of communication . . . and does not violate the First Amendment. . . .
>
> . . . .
>
> . . . If the ordinance herein merely disperses adult theatres . . . [i]t is not unconstitutional as applied, and is a reasonable restriction as to time, place and manner.

149 Cal. App. 3d at 641-42. The court apparently believed that whether the ordinance was narrowly tailored to a valid interest and whether there were adequate alternative channels, are two questions that are intertwined. In other words, it believed the ordinance would be "narrowly tailored" only if sufficient sites remained for the protected speech.

We do not believe the state appellate court decided whether the ordinance was narrowly tailored to a valid interest and we therefore hold the district court was not estopped from deciding this question.

C. Constitutionality

We need not decide whether the appropriate standard of review for these issues is de novo or clear error, *see generally United States v. McConney,* 728 F.2d 1195, 1199-1204 (9th Cir. 1984) (en banc) (some mixed questions of law and fact reviewed de novo, some reviewed for clear error), *cert. denied,* 105 S. Ct. 101 (1984); *Playtime Theaters, Inc. v. City of Renton,* 748 F.2d 527, 535 (9th Cir. 1984) (some first amendment issues reviewed de novo); *also Pullman-Standard v.*

Swint, 456 U.S. 273, 288-89 (1982) (motive a "pure question of fact"), for under either standard we affirm the findings of the district court.

1. Governmental Interests

"[F]ederal courts strictly scrutinize zoning decisions that impinge on first amendment rights." *Tovar v. Billmeyer*, 721 F.2d 1260, 1264 (9th Cir. 1983), *cert. denied*, 105 S. Ct. 223 (1984). "[T]he incidental restriction on first amendment freedoms can be 'no greater than is essential to the furtherance' of the governmental interest." *Id.* (citing *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 79-80 (1976) (Powell, J., concurring)).

The City offered no evidence to support its argument. It cited cases holding that concentrations of adult businesses caused urban blighting and that a municipality could legitimately require these businesses not to locate near one another. There is no concentration of adult theatres in Whittier; in fact the Wardman Theatre is the only one. Furthermore, this interest might logically support the ordinance's requirement that adult businesses be 1,000 feet apart, but not that they be 1,000 feet from a church.

Even if we take notice of the staff report produced at the time Ordinance No. 2327 was enacted and of the latest ordinance, as the City has asked us to do, we arrive at the same conclusion. The report itself and the later statements again rely on the inapplicable *Young* case for the proposition that concentrations of adult businesses have an adverse effect on neighborhoods. And the report asserts that a separation of 1,000 feet is needed because it will "for the most part prevent[] [adult businesses] from locating within the same block as a church." The map of Whittier Village introduced by the City reveals that all the blocks which surround the

Wardman are 500 feet on their longest side. It is therefore apparent that the 1,000 feet requirement is not necessary to prevent such theatres from being located in the same block as a church.

2. Availability of Other Sites

If the ordinance severely restricts the availability of a form of protected speech in Whittier, it violates the first amendment. *See Schad v. Borough of Mount Ephraim,* 452 U.S. 61, 76 (1981); *Alexander v. City of Minneapolis,* 698 F.2d 936, 938-39 (8th Cir. 1983); *Basiardanes v. City of Galveston,* 682 F.2d 1203, 1213-14 (5th Cir. 1982). The district court found that the church provision "makes it impossible to operate an adult theater in the central business district of Whittier" and that "the ordinance's effect would then be a total exclusion of adult theaters in . . . Whittier."

The evidence on this issue included the testimony of Mr. Porter, the City Planning Director, for the City of Whittier, and Mr. Metcalfe, a real estate appraiser, for Walnut Properties. Mr. Porter testified that there were thirty-five acres in Whittier upon which an adult theatre could be located. Mr. Metcalfe testified that there were twelve acres, all of which were in the Whitwood Shopping Center. Walnut contends these acres will also be unavailable if the Center is considered to be one "lot" for the purposes of the ordinance. The district court was entitled to believe Mr. Metcalfe, and although the ordinance does not by itself ban adult theatres from Whittier the reluctance of a shopping center owner to lease to such a theatre and the unlikelihood of an appropriate vacancy will probably have the same effect. In any event, this court may take judicial notice of the fact that a circle with a radius of 1,000 feet covers an area of seventy-three acres. Thus, if one theatre located

in the Whitwood Center, all other adult businesses would be barred from the City.

3. Motive

An ordinance is also unconstitutional if "a motivating reason for the Council's actions" was "to suppress protected expression." *Tovar,* 721 F.2d at 1266 (modifying previous test that "the real purpose" of the ordinance had to be suppression). The district court found that the City's action was improperly motivated. It based that finding at least in part on deposition testimony by Mr. Porter, the City Planning Director. Without objection Porter testified that the staff report recommending the original emergency ordinance did not state a justification for the ordinance, but that the actual justification was that churches were morally opposed to "the display of the human body."

Porter's testimony is admissible for determining the motive behind the ordinance if it showed objectively "the chain of events from which intent may be inferred." *City of Las Vegas v. Foley,* 747 F.2d 1294, 1298 (9th Cir. 1984); *Tovar,* 721 F.2d at 1264-67; *Ebel v. City of Corona,* 698 F.2d 390, 393 (9th Cir. 1983). Testimony may not be admitted, however, which speculates about the subjective intentions of individual legislators. *See Foley,* 747 F.2d at 1298-99. We consider the testimony, in the absence of objection, as a statement of the chain of events leading to the ordinance's enactment.

We observe a number of characteristics of the ordinance and events surrounding its enactment also support a finding of improper motive. For example, the first emergency ordinance was passed very shortly after Walnut began to show adult films and at a time when some groups in Whittier protested an adult theatre's locating there. The ordinance did not contain a

grandfather clause and no valid governmental purpose has been shown for it. The district court could also have properly relied on these objective facts. We therefore affirm the finding of improper motive.

D. Attorney's Fees

Walnut, as a successful plaintiff in an action brought under 42 U.S.C. § 1983 (1982), moved for $39,035 in attorneys' fees, which amount the district court awarded. The City contends that only $3,862 should be allowed. This court reviews the amount of the award for abuse of discretion. *See* 42 U.S.C. § 1988 (1982); *Blum v. Stenson,* ___ U.S. ___, 104 S. Ct. 1541, 1545 (1984); *Moore v. Jas. H. Matthews & Co.,* 682 F.2d 830, 838 n.8 (9th Cir. 1982). "The initial estimate of a reasonable attorney's fee is properly calculated by multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate." *Blum,* 104 S. Ct. at 1543-44.

1. Hourly Rate

This court has declined to endorse the "lodestar approach" used in other circuits under which, absent special circumstances, the starting figure for an hourly rate should be "counsel's normal billing rate." *Moore,* 682 F.2d at 840. Instead, it adheres to a list of twelve factors for determining the fee award as a whole. *See id.* at 838 (listing factors), 840 (approving *Kerr v. Screen Extras Guild, Inc.,* 526 F.2d 67, 69-70 (9th Cir. 1975), *cert. denied,* 425 U.S. 951 (1976)). The factors which seem to directly affect an attorney's hourly rate include the skill required in the case, the customary fee, the experience, reputation, and ability of the attorney, and the length of the professional relationship with the client.

Walnut's hourly rate is not unreasonable for a case which wound its way through five different courts and

for an attorney who has orally argued ten cases before the United States Supreme Court, who has practised for thirty-five years, and who has been awarded $200 per hour in another matter.

This conclusion is reinforced by the fact that the City failed to develop any evidence from an impartial expert witness that the rate was unreasonable.

2. Hours Spent on "Unsuccessful Claims"

In *Hensley v. Eckerhart,* 461 U.S. 424, 434 (1983), the Supreme Court stated that "[i]n some cases a plaintiff may present in one lawsuit distinctly different claims for relief that are based on different facts and legal theories." In such a case, if the plaintiff succeeds on only some of his claims, he will not be awarded attorneys fees for time spent on unsuccessful claims. *Id.* at 435.

Although Walnut's complaint did allege violations of several constitutional provisions and amendments, each stemmed from a common factual predicate. Furthermore, in *Blum,* the Court stated: "[W]e reiterate what was said in *Hensley:* 'where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will encompass all hours reasonably expended on the litigation.' " 104 S. Ct. at 1550 (quoting *Hensley,* 461 U.S. at 435). In fact this highlights that the *Hensley* case involved a plaintiff who obtained less *relief* than it had sought. *See Hensley,* 461 U.S. at 436-37. In this case, as the district court observed, plaintiff received all the relief it asked for. Here, too, the City failed to introduce any evidence that the time spent was unreasonable. Walnut will be compensated for all hours reasonably spent as found by the district court.

3. Contemporaneous Logs

The City observes that the *Hensley* Court permitted the district court there to reduce an award of attorneys' fees in part because of "inadequate documentation." *Hensley*, 461 U.S. at 433. But the Court also stated that "[w]e reemphasize that the district court has discretion in determining the amount of a fee award." *Id.* at 437. The district court here did not make such a reduction and it is not an abuse of discretion not to do so. *Bonnette v. California Health & Welfare Agency*, 704 F.2d 1465, 1473 (9th Cir. 1983).

4. Mr. Metcalfe

The City argues that "[a]ll the time [Walnut's attorney] spent with Mr. Metcalfe must be deducted because Mr. Metcalfe's expertise and testimony at trial had nothing whatsoever to do with the issue on which Walnut prevailed." From the discussion above, it is apparent that Mr. Metcalfe was a critical witness whose testimony persuaded the district court to find for Walnut on an important issue.

5. Different Tasks

The City cites one authority in this circuit for the proposition that the trend in the Ninth Circuit is to differentiate between the kinds of legal work involved. *Chapman v. Pacific Telephone and Telegraph Co.*, 456 F. Supp. 77 (N.D. Cal. 1978). No authority appears for the proposition that failing to do so is an abuse.

In *Hensley*, the Court admonished that a "request for attorney's fees should not result in a second major litigation." 461 U.S. at 437. The district court was aware of the different tasks performed by Walnut's attorneys and awarded an average rate based on all. This efficient procedure should not be deemed an abuse by a panel

aware of the great discretion vested in trial courts to award reasonable fees.

CONCLUSION

The district court was not barred from determining whether the ordinance violated the first amendment as applied or any of the factual issues allegedly determined in the prior action. Its findings that the ordinance had been unconstitutionally motivated, that it had an unconstitutional effect, and that the infringement it caused had not been justified are each a basis for declaring the ordinance unconstitutional and we affirm each. Finally, the court did not abuse its discretion in awarding reasonable attorneys' fees.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

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CLERK, U.S. COURT OF APPEALS

WALNUT PROPERTIES, INC., a California Corporation, and VINCENT MIRANDA, an individual,

Plaintiffs-Appellees,

v.

CITY OF WHITTIER, a Charter City; M.D. KLAXTON, R.L. HENDERSON, L.A. STRONG, GENE CHANDLER, V.A. LOPEZ, as Members of the Whittier City Council; JAMES BALE, as Chief of Police of the City of Whittier; and JOHN ROBERT FLANDRICK, as City Attorney of the City of Whittier,

Defendants-Appellants.

Nos. 84-5755, 84-6087

D.C. No. CV 81-2262-R

ORDER

On appeal from the United States District Court for the Central District of California
Hon. Manuel L. Real, District Judge, presiding

Before: BOOCHEVER and BEEZER, Circuit Judges and SOLOMON,* District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The panel has voted to make the following amendments to the Memorandum:

Replace the language at page 8, line 19 through page 10, line 4, with the following:

> court found that the City's action was improperly motivated. It based that finding at least in part on deposition testimony by Mr. Porter, the City Planning Director. Without objection Porter testified that the staff report recommending the original emergency ordinance did not state a justification for the ordinance, but that the actual justification was that churches were morally opposed to "the display of the human body."
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> Porter's testimony is admissible for determining the motive behind the ordinance if it showed objectively "the chain of events from which intent may be inferred." *City of Las Vegas v. Foley,* 747 F.2d 1294, 1298 (9th Cir. 1984); *Tovar,* 721 F.2d at 1264-67; *Ebel v. City of Corona,* 698 F.2d 390, 393 (9th Cir. 1983). Testimony may not be admitted, however, which speculates about the subjective intentions of individual legislators. *See Foley,* 747 F.2d at 1298-99. We consider the testimony, in the absence of objection, as a statement of the chain of events leading to the ordinance's enactment.
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> We observe a number of characteristics of the ordinance and events surrounding its enactment also support a finding of improper motive. For example, the first emergency ordinance was passed very shortly after Walnut began to show adult films and at a time when

> some groups in Whittier protested an adult theatre's locating there. The ordinance did not contain a grandfather clause and no valid governmental purpose has been shown for it. The district court could also have properly relied on these objective facts. We therefore affirm the finding of improper motive.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The Memorandum is amended as set forth herein. The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAY 14 1985

PHILLIP B. WINBERRY
CLERK, U.S. COURT OF APPEALS

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Hon. Manuel L. Real, District Judge, presiding

Argued and submitted —
February 8, 1985, Pasadena, California

*The panel has concluded that the issues presented by this appeal do not meet the standards set by rule 21 of the rules of this court for disposition by written

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The City of Whittier (City) appeals a declaration that its zoning ordinance is unconstitutional. It also asserts the action below was barred by the doctrine of res judicata. The state action to which it refers did not result in a final judgment; therefore, res judicata does not apply. The ordinance violates the first amendment because it was not shown to justify legitimate government needs, because it *severely* restricts protected speech and because one of the City's *reasons* for enacting the ordinance was to suppress that speech. The district court's award of attorneys' fees to appellee was not an abuse of discretion.

Discussion

A. Res Judicata

In its opening brief, the City argues, without distinguishing them, that the doctrines of res judicata (or claim preclusion) and collateral estoppel (or issue preclusion) barred the district court suit. The two will be dealt with separately.

Res judicata bars a party from relitigating not only issues actually decided in a prior suit but also all those stemming from the same cause of action. *See, e.g., Los Angeles Branch NAACP v. Los Angeles Unified School District,* No. 81-5772, slip op. at 8 (9th Cir. Feb. 21,

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opinion. Accordingly, it is ordered that disposition be by memorandum, forgoing publication in the *Federal Reporter,* and that this memorandum may not be cited to or by the courts of this circuit save as provided in rule 21(c).

**Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

1985) (en banc); 18 C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 4406 & n.4 (1981) [hereinafter cited as Wright, Miller & Cooper]. Federal courts must accord a state court judgment the same preclusive effect the judgment would receive in the courts of that state. 28 U.S.C. § 1738 (1982); *Migra v. Warren City School District Board of Education,* ___ U.S. ___, 104 S. Ct. 892, 896-98 (1984); *Los Angeles NAACP,* slip op. at 8. In California, subsequent litigation is precluded 1) between the same parties, 2) on the same cause of action, if 3) "the first suit concluded in a final judgment on the merits." *Los Angeles NAACP,* slip op. at 8 (citing *Agarwal v. Johnson,* 25 Cal. 3d 932, 954, 603 P.2d 58, 72, 160 Cal. Rptr. 141, 155 (1979); *Slater v. Blackwood,* 15 Cal. 3d 791, 795, 543 P.2d 593, 594, 126 Cal. Rptr. 225, 226 (1975)). Plaintiff Walnut Properties, Inc. does not dispute that the first two requirements are satisfied here.

But no final judgment has issued from the state courts on whether Ordinance No. 2257 is constitutional as applied. The second state appellate decision did not purport to determine this question. *See* 149 Cal. App. 3d 633, 642, 197 Cal. Rptr. 127, 133 ("*If* [it] does not prevent the entry of new theatres into the market place, the ordinance is not unconstitutional as applied") (emphasis supplied; citation omitted). Instead it remanded to the state trial court. *Id.* The City's assertion that the state appellate court "decided the Ordinances were constitutional in all respects" is most charitably deemed wishful thinking. Federal law is clear that no preclusive effect is given when the appellate court reverses the trial court and remands for further proceedings, but no remand hearing is held. *E.g., Aurora City v. West,* 74 U.S. (7 Wall.) 82, 93 (1868) (where judgment for plaintiff was reversed and remanded,

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Although the language it used is somewhat ambiguous, we do not believe the state appellate court decided whether the City had narrowly tailored the ordinance to a compelling government need.

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> . . . .
>
> . . . If the ordinance herein merely disperses adult theatres . . . [i]t is not unconstitutional as applied, and is a reasonable restriction as to time, place and manner.

149 Cal. App. 3d at 641-42. The court apparently believed that whether the ordinance was narrowly tailored to a valid interest and whether there were adequate alternative channels, are two questions that are intertwined. In other words, it believed the ordinance would be "narrowly tailored" only if sufficient sites remained for the protected speech.

We do not believe the state appellate court decided whether the ordinance was narrowly tailored to a valid interest and we therefore hold the district court was not estopped from deciding this question.

C. Constitutionality

We need not decide whether the appropriate standard of review for these issues is de novo or clear error, *see*

generally United States v. McConney, 728 F.2d 1195, 1199-1204 (9th Cir. 1984) (en banc) (some mixed questions of law and fact reviewed de novo, some reviewed for clear error), *cert. denied*, 105 S. Ct. 101 (1984); *Playtime Theaters, Inc. v. City of Renton*, 748 F.2d 527, 535 (9th Cir. 1984) (some first amendment issues reviewed de novo); *also Pullman-Standard v. Swint*, 456 U.S. 273, 288-89 (1982) (motive a "pure question of fact"), for under either standard we affirm the findings of the district court.

1. Governmental Interests

"[F]ederal courts strictly scrutinize zoning decisions that impinge on first amendment rights." *Tovar v. Billmeyer*, 721 F.2d 1260, 1264 (9th Cir. 1983), *cert. denied*, 105 S. Ct. 223 (1984). "[T]he incidental restriction on first amendment freedoms can be 'no greater than is essential to the furtherance' of the governmental interest." *Id.* (citing *Young v. American Mini Theatres, Inc.*, 427 U.S. 50. 79-80 (1976) (Powell, J., concurring)).

The City offered no evidence to support its argument. It cited cases holding that concentrations of adult businesses caused urban blighting and that a municipality could legitimately require these businesses not to locate near one another. There is no concentration of adult theatres in Whittier; in fact the Wardman Theatre is the only one. Furthermore, this interest might logically support the ordinance's requirement that adult businesses be 1,000 feet apart, but not that they be 1,000 feet from a church.

Even if we take notice of the staff report produced at the time Ordinance No. 2327 was enacted and of the latest ordinance, as the City has asked us to do, we arrive at the same conclusion. The report itself and the later statements again rely on the inapplicable *Young*

case for the proposition that concentrations of adult businesses have an adverse effect on neighborhoods. And the report asserts that a separation of 1,000 feet is needed because it will "for the most part prevent[] [adult businesses] from locating within the same block as a church." The map of Whittier Village introduced by the City reveals that all the blocks which surround the Wardman are 500 feet on their longest side. It is therefore apparent that the 1,000 feet requirement is not necessary to prevent such theatres from being located in the same block as a church.

2. Availability of Other Sites

If the ordinance severely restricts the availability of a form of protected speech in Whittier, it violates the first amendment. *See Schad v. Borough of Mount Ephraim,* 452 U.S. 61, 76 (1981); *Alexander v. City of Minneapolis,* 698 F.2d 936, 938-39 (8th Cir. 1983); *Basiardanes v. City of Galveston,* 682 F.2d 1203, 1213-14 (5th Cir. 1982). The district court found that the church provision "makes it impossible to operate an adult theater in the central business district of Whittier" and that "the ordinance's effect would then be a total exclusion of adult theaters in . . . Whittier."

The evidence on this issue included the testimony of Mr. Porter, the City Planning Director, for the City of Whittier, and Mr. Metcalfe, a real estate appraiser, for Walnut Properties. Mr. Porter testified that there were thirty-five acres in Whittier upon which an adult theatre could be located. Mr. Metcalfe testified that there were twelve acres, all of which were in the Whitwood Shopping Center. Walnut contends these acres will also be unavailable if the Center is considered to be one "lot" for the purposes of the ordinance. The district court was entitled to believe Mr. Metcalfe, and although the

ordinance does not by itself ban adult theatres from Whittier, the reluctance of a shopping center owner to lease to such a theatre and the unlikelihood of an appropriate vacancy will probably have the same effect. In any event, this court may take judicial notice of the fact that a circle with a radius of 1,000 feet covers an area of seventy-three acres. Thus, if one theatre located in the Whitwood Center, all other adult businesses would be barred from the City.

3. Motive

An ordinance is also unconstitutional if "a motivating reason for the Council's actions" was "to suppress protected expression." *Tovar,* 721 F.2d at 1266 (modifying previous test that "the real purpose" of the ordinance had to be suppression). The district court's finding that the City's action was improperly motivated is also supported by the record. Mr. Porter stated that one reason for the church provision was that "most churches are against the display of the human body" and that adult theatres conflict with the morals of the churches. The City argues that Mr. Porter was not a City Council member and that his testimony is therefore not probative. It contends that under California law the council's motives cannot be probed. In *City of Las Vegas v. Foley,* 747 F.2d 1294, 1299 (9th Cir. 1984), this court prohibited plaintiffs from deposing council members to inquire into their states of mind. But in *Tovar* we approved of deposition testimony by the mayor that he had called a special meeting "to see what the City Council could do about getting [the theatre] out of Pocatello." *Foley,* 747 F.2d at 1298. Clearly the testimony of Mr. Porter is allowed in this case insofar as he reports objectively what concerns were voiced at City meetings.

Walnut also points out that the timing of the ordinance is suspect, that it did not contain a grandfather clause, and that it required every adult business to obtain a conditional use permit. By themselves, these facts might not support an inference of improper motive, but coupled with Mr. Porter's statements and the absence of a showing that the ordinance is narrowly tailored to a valid purpose, they do.

Thirdly, *Foley* states of *Ebel v. City of Corona,* 698 F.2d 390 (9th Cir. 1983), that

> objective evidence in that case indicated that the defendant city was attempting to suppress free speech. Ebel's was the only adult bookstore in town. It is doubtful that forcing it to relocate could have much of an impact on urban blight. . . . [T]he facts sufficiently indicated that the City['s] only purpose was to harass the bookstore by requiring it to relocate.

747 F.2d at 1299 (citation omitted). The same facts are present here.

Even if they are noticed, the minutes of the post hoc meeting at which the City reenacted the ordinance for the ostensible purpose of "prevent[ing] an irreconcilable incompatibility of uses" do not disturb the finding that "*a* motivating reason" for the ordinance was improper. This is especially true since the minutes reveal clearly that the purpose of the reenactment was to avoid the impact of the district court's findings.

D. Attorney's Fees

Walnut, as a successful plaintiff in an action brought under 42 U.S.C. § 1983 (1982), moved for $39,035 in attorneys' fees, which amount the district court awarded. The City contends that only $3,862 should be allowed.

This court reviews the amount of the award for abuse of discretion. *See* 42 U.S.C. § 1988 (1982); *Blum v. Stenson,* ___ U.S. ___, 104 S. Ct. 1541, 1545 (1984); *Moore v. Jas. H. Matthews & Co.,* 682 F.2d 830, 838 n.8 (9th Cir. 1982). "The initial estimate of a reasonable attorney's fee is properly calculated by multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate." *Blum,* 104 S. Ct. at 1543-44.

1. Hourly Rate

This court has declined to endorse the "lodestar approach" used in other circuits under which, absent special circumstances, the starting figure for an hourly rate should be "counsel's normal billing rate." *Moore,* 682 F.2d at 840. Instead, it adheres to a list of twelve factors for determining the fee award as a whole. *See id.* at 838 (listing factors), 840 (approving *Kerr v. Screen Extras Guild, Inc.,* 526 F.2d 67, 69-70 (9th Cir. 1975), *cert. denied,* 425 U.S. 951 (1976)). The factors which seem to directly affect an attorney's hourly rate include the skill required in the case, the customary fee, the experience, reputation, and ability of the attorney, and the length of the professional relationship with the client.

Walnut's hourly rate is not unreasonable for a case which wound its way through five different courts and for an attorney who has orally argued ten cases before the United States Supreme Court, who has practised for thirty-five years, and who has been awarded $200 per hour in another matter.

This conclusion is reinforced by the fact that the City failed to develop any evidence from an impartial expert witness that the rate was unreasonable.

2. Hours Spent on "Unsuccessful Claims"

In *Hensley v. Eckerhart,* 461 U.S. 424, 434 (1983), the Supreme Court stated that "[i]n some cases a plaintiff may present in one lawsuit distinctly different claims for relief that are based on different facts and legal theories." In such a case, if the plaintiff succeeds on only some of his claims, he will not be awarded attorneys fees for time spent on unsuccessful claims. *Id.* at 435.

Although Walnut's complaint did allege violations of several constitutional provisions and amendments, each stemmed from a common factual predicate. Furthermore, in *Blum,* the Court stated: "[W]e reiterate what was said in *Hensley:* 'where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will encompass all hours reasonably expended on the litigation.' " 104 S. Ct. at 1550 (quoting *Hensley,* 461 U.S. at 435). In fact this highlights that the *Hensley* case involved a plaintiff who obtained less *relief* than it had sought. *See Hensley,* 461 U.S. at 436-37. In this case, as the district court observed, plaintiff received all the relief it asked for. Here, too, the City failed to introduce any evidence that the time spent was unreasonable. Walnut will be compensated for all hours reasonably spent as found by the district court.

3. Contemporaneous Logs

The City observes that the *Hensley* Court permitted the district court there to reduce an award of attorneys' fees in part because of "inadequate documentation." *Hensley,* 461 U.S. at 433. But the Court also stated that "[w]e reemphasize that the district court has discretion in determining the amount of a fee award." *Id.* at 437. The district court here did not make such a reduction and it is not an abuse of discretion not to do so. *Bonnette*

v. California Health & Welfare Agency, 704 F.2d 1465, 1473 (9th Cir. 1983).

4. Mr. Metcalfe

The City argues that "[a]ll the time [Walnut's attorney] spent with Mr. Metcalfe must be deducted because Mr. Metcalfe's expertise and testimony at trial had nothing whatsoever to do with the issue on which Walnut prevailed." From the discussion above, it is apparent that Mr. Metcalfe was a critical witness whose testimony persuaded the district court to find for Walnut on an important issue.

5. Different Tasks

The City cites one authority in this circuit for the proposition that the trend in the Ninth Circuit is to differentiate between the kinds of legal work involved. *Chapman v. Pacific Telephone and Telegraph Co.*, 456 F. Supp. 77 (N.D. Cal. 1978). No authority appears for the proposition that failing to do so is an abuse.

In *Hensley*, the Court admonished that a "request for attorney's fees should not result in a second major litigation." 461 U.S. at 437. The district court was aware of the different tasks performed by Walnut's attorneys and awarded an average rate based on all. This efficient procedure should not be deemed an abuse by a panel aware of the great discretion vested in trial courts to award reasonable fees.

CONCLUSION

The district court was not barred from determining whether the ordinance violated the first amendment as applied or any of the factual issues allegedly determined in the prior action. Its findings that the ordinance had been unconstitutionally motivated, that it had an

unconstitutional effect, and that the infringement it caused had not been justified are each a basis for declaring the ordinance unconstitutional and we affirm each. Finally, the court did not abuse its discretion in awarding reasonable attorneys' fees.

AFFIRMED.

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ENTERED
MAR -8 1984
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
Deputy
By

FILED
MAR 8 1984
CLERK, U. S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY
DEPUTY

WALNUT PROPERTIES, INC., a California corporation; and VINCENT MIRANDA,

Plaintiffs,

v.

CITY OF WHITTIER, a Charter City, et al.,

Defendants.

CV 81-2262-R

JUDGMENT

The Court, having made its Findings of Fact and Conclusions of Law, now makes the following Judgment:

1. That Ordinance Nos. 2116, 2121, 2128, 2138, 2254, and 2257, as adopted by the City Council of the City of Whittier, are, except as is expressly hereinafter set forth, valid and subsisting, having been properly and lawfully adopted by the said City Council. The exception, above referred to, is that that portion of Ordinance No. 2257 which prohibits the location of an adult business within 1,000 feet of a church (subsection (2) of Section (c) of Section

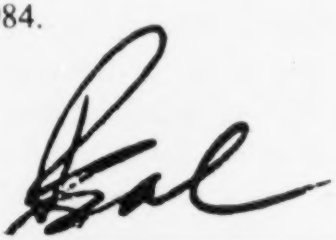
9512.1 of the Whittier Municipal Code as adopted by Ordinance No. 2257), is declared invalid on the ground that at the time of the public hearing preceding the enactment of the said ordinances, there was insufficient evidence presented to the City Council to support its conclusion that this portion of the regulations was reasonably required to protect the public health, safety and general welfare.

2. Defendants, their agents, servants, employees and representatives are enjoined from initiating any criminal proceedings against plaintiffs, their employees, representatives or agents, based upon the operation of their theater located at 7028 Greenleaf Avenue, Whittier, California, solely because it is within 1,000 feet of a church.

3. Defendants and their agents, servants, representatives and employees are enjoined from initiating any injunction proceedings against plaintiffs, their agents, servants, representatives or employees based upon the operation of their theater located at 7028 Greenleaf Avenue, Whittier, California, solely because the theater is within 1,000 feet of a church.

4. Defendants shall pay plaintifffs costs in the amount of $_____.

DATED: March 8, 1984.



MANUEL L. REAL
UNITED STATES DISTRICT JUDGE

APPENDIX E

Law Offices
STANLEY FLEISHMAN
A Professional Corporation
2049 Century Park East, Suite 3160
Los Angeles, California 90067
(213) 551-2923

FILED
MAR 8 1984
CLERK, U. S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

ENTERED
MAR - 9 1984
CLERK, U. S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

WALNUT PROPERTIES, INC., a California corporation; and VINCENT MIRANDA, Plaintiffs, v. CITY OF WHITTIER, a Charter City, et al., Defendants.	No. 81-2262-R FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter duly came on for trial before the Honorable Manuel L. Real, Chief Judge, United States District Court for the Central District of California, Stanley Fleishman appearing for plaintiffs and Robert Flandrick appearing for defendants. The court having heard the evidence and being fully informed now makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. This is an action for declaratory and injunctive relief as follows:

A. Plaintiffs seek to obtain a judicial declaration that the City of Whittier's "Adult Business Ordinance", as it applies to a motion picture theater, is unconstitutional on its face, and as applied, violating the First and Fourteenth Amendments to the United States Constitution. Plaintiffs seek injunctive relief to prevent the defendants from enforcing the said ordinance against plaintiffs; and

B. Defendants by their counter-claims seek a judicial declaration that the ordinance is valid and subsisting.

2. The plaintiffs herein are Walnut Properties, Inc., a California corporation ("Walnut"), and Vincent Miranda, its President.

3. The defendants are City of Whittier, a Charter City; M. D. Klaxton, R. L. Henderson, L.A. Strong, Gene Chandler, V. A. Lopez, as members of the Whittier City Council; James Bale, as Chief of Police of the City of Whittier; and John Robert Flandrick as City Attorney of the City of Whittier.

4. Walnut is the owner of certain real property located at 7028 Greenleaf Avenue, Whittier, California, more particularly described as Lots 15, 16, and 17 of Block 20 of Whittier, in the City of Whittier, County of Los Angeles, State of California, as per map recorded in Book 21 at pages 55 and 56 of Miscellaneous Records, in the Office of the Recorder of the County of Los Angeles, (hereinafter "Property").

5. Walnut, an exhibitor of motion picture films, is engaged in an activity which is protected by the First and Fourteenth Amendments to the Federal Constitution, so long as the motion picture films are not obscene.

6. During May 1977, Walnut commenced to operate upon the Property a motion picture theater, exhibiting "Adult" films, as part of its chain of "PussyCat Theaters".

7. On June 22, 1977, the City enacted as an "urgency measure" Ordinance No. 2116 which had the purpose and effect of imposing certain limitations on "adult businesses".

8. On October 11, 1977, the City enacted as an "urgency measure" Ordinance No. 2121 reenacting, and readopting the terms and provisions of Ordinance No. 2116. On December 7, 1977, the City enacted as an "emergency measure" Ordinance No. 2128 which essentially continued in effect the provisions of Ordinance No. 2116, as it related to "adult businesses."

9. The emergency ordinances culminated in the enactment of Ordinance No. 2138 (hereinafter "first ordinance") on November 7, 1978. Except for its proximity to a church, Walnut's theater met all of the locational requirements of the first ordinance. The theater is located in the C-2 zone; is not within 500 feet of any lot classified in any of the R zones; is not within 1000 feet of any lot upon which there is located any public, private or parochial, elementary, Junior High, High School; is not within 1000 feet of any lot upon which there is located a city-owned, operated and maintained public park; is not within 1000 feet of any lot on which there is located another adult business; and is not within 500 feet of any lot on which there is located a business with a type-40-, 42-, 80-,and 61-on-sale alcohol beverage license.

10. Walnut Theatre is the only theater in Whittier exhibiting adult films, and it is within 1000 feet of a church. By reason of its proximity to a church, the City filed an action against Walnut pursuant to the first

ordinance seeking an injunction restraining Walnut from operating its theater, as an adult theater, at 7028 Greenleaf Avenue, Whittier, California, because of its closeness to a church. *City of Whittier v. Walnut Properties, Inc., et al.,* LASC No. SEC 29232.

11. The case was heard by the Honorable Vincent Dalsimer, Judge, Los Angeles Superior Court. On March 24, 1981, Judge Dalsimer filed Findings of Fact and Conclusions of Law holding that the first ordinance was unconstitutional on its face. He stated that the portion of the ordinance prohibiting an adult theater from locating within 500 feet of a "public facility which is utilized by minors," has the legal effect of prohibiting the location of any adult business on any location within the City. Judge Dalsimer concluded:

> "The absolute prohibition of an otherwise lawful business constitutes a violation of the state and Federal Constitutions and such ordinance is found to be void as applied to the defendant Walnut herein.
>
> "Walnut is entitled to a judgment dismissing the complaint against it."

12. On the same day Judge Dalsimer signed his Findings of Fact and Conclusions of Law the City passed and approved as an emergency ordinance, Ordinance No. 2257, the ordinance involved in this case. Basically, this second ordinance is the same as the first ordinance, except that it eliminates the prohibition of operating an adult theater within 500 feet of a "public facility which is utilized by minors." This second ordinance, like the first ordinance, prohibits an adult theater from operating within 1000 feet of a church.

13. On May 7, 1981, Walnut filed its complaint in this case alleging that unless restrained, the defendants

would initiate criminal proceedings against plaintiffs for operating an adult theater in a forbidden area and would seek injunctive relief requiring plaintiffs to discontinue exhibiting constitutionally protected film dealing with sex in their theater.

14. The City filed a Notice of Appeal on April 29, 1981 from Judge Dalsimer's ruling holding the first ordinance unconstitutional.

15. This court conducted a full trial prior to the time the appellate proceedings were concluded in the state court. A chronology of the events in the state appellate courts follows:

A. On February 1, 1983, the state Court of Appeal reversed the judgment of the Superior Court, holding that the trial court should have based its decision on the second ordinance, not on the first ordinance under which the complaint was filed. The Court of Appeal then held the second ordinance to be constitutional.

B. On February 15, 1983, in response to plaintiffs' Petition for Rehearing, the Court of Appeal modified its opinion and judgment and ordered the Superior Court to hold a hearing to determine whether plaintiffs' theater was an adult theater within the meaning of the ordinance. The court then denied the Petition for Rehearing.

C. On May 19, 1983, in response to plaintiffs' Petition for Hearing, the California Supreme Court granted the Petition and retransferred the matter to the Court of Appeal with directions to reconsider on remand its order in certain enumerated respects.

D. On December 8, 1983, the Court of Appeal rendered its second decision, stating in relevant part:

> "No evidence having been introduced on the crucial issue of the availability of other areas

> in which the theater might be operated, the matter must be remanded for a hearing and determination of that issue."

The Court of Appeals reversed the judgment of the Superior Court, stating:

> "On remand, the trial court shall make the necessary rulings on proffered evidence to the status of the theater as an 'adult theater' and as to the availability of alternate sites in the City of Whittier, and enter judgment in accordance with this opinion and such additional findings."

E. On February 2, 1984, the California Supreme Court denied plaintiffs' petition for hearing.

16. On February 13, 1984, this court held a hearing to consider events which occurred after the completion of the trial herein. After considering the events occurring in the state court and two recent decisions of the United States Court of Appeals for the Ninth Circuit (*Tovar, et al. v. Billmeyer,* 721 F.2d 1260 (9th Cir. 1983) and *Cinema Arts, Inc. v. County of Clark,* 722 F.2d 579 (9th Cir. 1983)) the court concluded that there was no reason why it should not render its decision herein.

17. The provision of the ordinance which prohibits an adult theater from operating within 1000 feet of a church is unconstitutional because the City failed to justify this prohibition. Prior to enacting the first ordinance, the City prepared a report dealing with the concentration of adult businesses and their effect upon immediately adjacent residential and commercial property. The report states that a "brief discussion with a representative of Whittier Presbyterian Church revealed that while the representative was very much aware of the presence of adult businesses, there was no

evidence of direct impact on the church." The report noted that churches are closed during the peak hours when adult businesses operate. Therefore, the report stated, the effect of an adult business on a church would naturally be less than on parks. The report stated:

> "[I]t may be in the community interest to require separation between adult businesses and parks. Five Hundred feet should be considered a minimum separation, as this distance can be easily walked in less than five minutes. A thousand feet would require an individual to purposely set out to walk whereas five hundred feet or under can be 'wandered into.' "

The report did not reveal sufficient justification for prohibiting an adult theater from operating within 1000 feet of a church, nor did the City present any evidence revealing that any such justification existed.

18. At trial, Elvin Porter, Director of Planning of the City of Whittier, sought to justify the separation, stating that "most churches are against the display of the human body. . . for anyone that wants to view the human body and acts." Displaying or viewing the human body in the nude is within the broad protection of the First Amendment. *Schad v. Borough of Mt. Ephraim,* 542 U.S. 61, 101 S.Ct. 2176 (1981). It thus appears that a motivating factor in the decision to prohibit an adult business from operating within 1000 feet of a church was to restrict plaintiffs' exercise of First Amendment rights.

19. Mr. Porter also justified the separation of an adult theater from a church by stating that their proximity created a "morals" conflict. It is settled that moral objections to First Amendment activities cannot justify

an ordinance impinging on freedom of expression. *Morris v. Municipal Court for San Jose-Milpitas Jud. Dist.*, 32 C.3d 553, 186 Cal.Rptr.494 (1982). Moreover prohibiting an adult theater, exhibiting constitutionally protected film, from operating within 1000 feet of a church raises substantial First Amendment questions concerning the separation of church and state. *See, Larkin v. Grendel's Den, Inc.*, ___ U.S. ___, 103 S.Ct.505 (1982).

Finally, the City has failed to meet its burden of proving that its decision to separate a church and an adult theater by 1000 feet furthers a compelling government interest unrelated to the suppression of free expression. The provision of the ordinance requiring a 1000-foot separation between an adult theater and a church makes it impossible to operate an adult theater in the central business district of Whittier because there is no location in that area which is not within 1000 feet of a church, school or park, or within 500 feet of an R- zone.

20. Since Walnut has the only theater in Whittier exhibiting adult films, its elimination would leave the City without any theaters showing such films, and the ordinance's effect would then be a total exclusion of adult theaters in the City of Whittier.

CONCLUSIONS OF LAW

1. The court has jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343(3) (4), 2201, 2202, and pursuant to 42 U.S.C. § 1983.

2. Abstention is not appropriate in this case. *Cinema Arts, Inc. v. County of Clark*, 722 F.2d 279 (9th Cir. 1983).

3. The judgment of the state Court of Appeal, reversing the judgment of the Superior Court, has not resulted in a judgment on the merits, and *res judicata* is inapplicable to this case. No state tribunal has taken evidence on whether the City adequately justified the provision of its ordinance prohibiting an adult theater from operating within 1000 feet of a church. Where, as here, plaintiffs preserve their right to have federal constitutional claims resolved in a federal court, the federal court must exercise the jurisdiction entrusted to it by the Constitution and laws of the United States. The state proceedings relied upon by the defendants herein do not justify stripping the court of its proper jurisdiction. *See, Tovar v. Billmeyer,* 721 F.2d 1260, 1267 n. 8 (9th Cir. 1983).

4. Under the strict scrutiny standard, applicable to this case (*Tovar v. Billmeyer, supra,* 721 F.2d at 1264) Whittier's ordinance must be justified by a compelling state interest. The City has failed to meet its burden of proving that the provision of its zoning ordinance requiring a 1000-foot separation between a church and an adult theater furthers a compelling government interest unrelated to the suppression of free expression. The City has also failed to establish that its desire to prevent blighting and downgrading of commercial and residential areas adjacent to a concentration of adult businesses could not be accomplished without prohibiting an adult theater from operating within 1000 feet of a church. Indeed, the proximity of an adult theater to a church appears to be totally unrelated to the "blighting and downgrading" of commercial and residential areas adjacent to "concentrated" adult businesses. There is no sufficient factual basis for the City's decision to prohibit an adult theater from operating within 1000 feet of a church.

5. Because the City has failed to justify the provision of its ordinance prohibiting an adult theater from operating within 1000 feet of a church, and because a motivating factor in the City's establishing that prohibition was to restrict the exercise of First Amendment rights, that provision of Ordinance No. 2257 is unconstitutional, violating the Free Speech and Press provisions of the First and Fourteenth Amendments.

The Ninth Circuit has firmly established that:

> "zoning decisions may not constitutionally be made for the purpose of restricting protected First Amendment speech, including that which is sexually explicit. *See generally, Kuzinich v. County of Santa Clara,* 689 F.2d 1345, 1347 (9th Cir. 1982). Consequently, federal courts strictly scrutinize zoning decisions that impinge on First Amendment rights. *See generally, Young v. American Mini Theatres,* 427 U.S. 50, 56 and n. 12 (1976); *Interstate Circuit, Inc. v. Dallas,* 390 U.S. 676 (1968); *Ebel v. City of Corona,* 698 F.2d 390, 392 (9th Cir. 1983). *Cf. Harper and Virginia Board of Elections,* 383 U.S. 663, 670 (1966). Under the strict scrutiny standard, zoning decisions aimed at regulating unprotected activities that incidentally limit free expression are valid only if justified by a compelling state interest. *Young,* 427 U.S. at 56 n. 12; *Ebel,* 698 F.2d at 392."

Tovar v. Billmeyer, 721 F.2d at 1264.

In *Tovar,* the court stated (at 1265, 1266, 1267):

> "A zoning decision that has as a purpose the restriction of protected First Amendment activities cannot survive strict constitutional scrutiny. . . .

> "If a motivating reason for the Council's actions was to prevent the theater from operating then the zoning decision would violate the First Amendment. . . . Defendant's case will depend on proof that the zoning decisions were motivated by a desire to further a compelling governmental interest unrelated to the suppression of free expression. . . . '[T]he District Court should make factual findings on the validity of the City's assertion of harm [to be prevented by zoning] and then closely scrutinize the [zoning] ordinance's relationship to prevention of the alleged harm.'. . . [I]n order for defendants to prevail, the court must find that other actions [less restrictive] could not have prevented the harms involved. *Kuzinich,* 689 F.2d at 1348."

6. Plaintiffs are entitled to a judgment declaring that the ordinance herein is unconstitutional insofar as it prohibits an adult theater from operating within 1000 feet of a church. Plaintiffs are also entitled to an injunction restraining the defendants from initiating any criminal proceedings against plaintiffs or their employees, or from initiating any injunctive proceedings against plaintiffs or their employees based upon the operation of plaintiffs' theater within 1000 feet of a church.

7. The ordinance applies to plaintiffs because their theater is within 1000 feet of a church. By invalidating the provision of the ordinance applicable to plaintiffs, they will receive all the relief they need. The ordinance is otherwise constitutional.

8. Plaintiffs, as the prevailing parties in this action, are entitled to a reasonable attorney's fee pursuant to 42 U.S.C. § 1988.

9. Any Finding of Fact which is more appropriately a Conclusion of Law and any Conclusion of Law which is more appropriately a Finding of Fact shall be so deemed.

LET JUDGMENT ENTER ACCORDINGLY.

MAR 8 1984

MANUEL L. REAL

MANUEL L. REAL
UNITED STATES DISTRICT JUDGE

APPENDIX F

CITY OF WHITTIER, Plaintiff and Appellant, v. WALNUT PROPERTIES, INC., Defendant and Respondent.

COUNSEL

Robert Flandrick, City Attorney, Williams & Sorensen and Virginia R. Pesola for Plaintiff and Appellant.

Stanley Fleishman for Defendant and Respondent.

OPINION

KINGSLEY, J.—This action was filed by City of Whittier to compel Walnut Properties, Inc., to comply with the city's zoning code that regulates "adult businesses.'

FACTS

On February 7, 1978, City of Whittier adopted an amendment to its zoning regulations by Ordinance No. 2138. The code established locational regulations applicable to "adult" business establishments within the city. The code declares "adult" businesses lawfully in existence prior to the effective date of the code to be legal nonconforming uses which are subject to abatement by administrative process.

Walnut owned and operated in the City of Whittier, as part of its "Pussycat" theatre chain, what is alleged to be an adult theatre.

Pursuant to section 9322(3) the superintendent of building and safety issued to Walnut an administrative order of abatement. Walnut appealed to the city planning commission and objected to the constitutionality of the code. The planning commission issued an order of abatement. Walnut appealed to the city council, which ordered the termination of the "adult theatre" use. Walnut failed to comply and the city sued for injunctive relief.

Walnut denied it was an "adult theatre" within the ordinance and alleged that the ordinance was uncon-

stitutional. We here determine only the issue of constitutionality. Walnut asked the court to take judicial notice of the fact that it had the only theatre in the city which allegedly is an "adult" theatre within the meaning of the ordinance.

The court found that language contained in section 9512, subdivision (2)(c) renders the code unconstitutional[1] in that the language prohibited the operation of any "adult business" at any location in the city. The court concluded as follows in conclusions (1) and (2):

"1. The portion of § 9512(2)(c) of the Whittier Municipal Code specifically the words 'other public facility which is utilized by minors,' has the legal effect of prohibiting the location of any adult business on any location within the City in that, the phrase 'public facility' means, and includes, among other things, any retail commercial facility which is open to members of the

[1]Section 9512, subdivisions (1) and (2) of code reads in its entirety as follows:

"SECTION 9512—Special Regulations—All uses subject to the provisions of this part shall comply with all of the regulations contained in this chapter, and the following regulations: [¶] (1) That prior to establishing or conducting of any adult business, a conditional use permit therefor shall be obtained, pursuant to the provisions of Part 8 of this chapter; and [¶] (2) That no adult business shall be granted a conditional use permit unless the lot upon which such business is proposed to be located: [¶] (a) Is classified in Zone C-2 or a less restrictive zone; and [¶] (b) Is not within five hundred (500) feet of any lot classified in any of the R zones; and [¶] (c) Is not within one thousand (1,000) feet of any lot upon which there is located a church, or educational institution, park or other public facility which is utilized by minors; and [¶] (d) Is not within one thousand (1,000) feet of any lot on which there is located another adult business; and [¶] (e) Is not within five hundred (500) feet of any lot upon which is located a business with a type 40, 42, 48 or 61 onsale alcoholic beverage license. (Ord. No. 2138, & 2, 2-7-78.)"

public, and is utilized by minors, such as grocery stores and drug stores.

2. The absolute prohibition of an otherwise lawful business constitutes a violation of the state and federal constitutions and such ordinance is found to be void as applied to the defendant Walnut herein."

Prior to the entry of judgment the city asked the court to take judicial notice of Ordinance No. 2254 which was enacted as an urgency measure on February 3, 1981. This was enacted in response to the trial court's proposed interpretation and to clarify any ambiguities. Sections 3, 4 and 5 of Ordinance No. 2254 read as follows:

"SECTION 3. Section 9512.1 is hereby added to the Whittier Municipal Code to read as follows:

" '9512.1 *-ALTERNATE SPECIAL REGULATIONS.* The special regulations set forth in this section shall apply to all uses which are subject to the provisions of this part if for any reason any of the special regulations set forth in Section 9512 hereof are declared invalid as applied to any such use.

"(1) That prior to establishing or conducting of any adult business, a conditional use permit therefor shall be obtained, pursuant to the provisions of Part 9 of this chapter; and

"(2) That no adult business shall be granted a conditional use permit unless the lot upon which such business is proposed to be located:

"(a) Is classified in Zone C-2 or a less restrictive zone; and

"(b) Is not within five hundred (500) feet of any lot classified in any of the R Zones; and

"(c) Is not within one thousand (1,000) feet of any lot upon which there is located a church; or

"(d) Is not within one thousand (1,000) feet of any lot upon which there is located any public, private or parochial, elementary, junior high, high school; or

"(e) Is not within one thousand (1,000) feet of any lot upon which there is located a City owned, operated and maintained public park; or

"(f) Is not within one thousand (1,000) feet of any lot on which there is located another adult business; or

"(g) Is not within five hundred (500) feet of any lot on which is located a business with a type 40, 42, 48 or 61 on sale alcoholic beverage license.'

"SECTION 4. If any section, subsection, subdivision, sentence, clause or phrase of this Ordinance is for any reason held to be unconstitutional or otherwise invalid, such decision shall not affect the validity of the remaining provisions of this Ordinance. The City Council hereby declares that it would have passed this Ordinance and each section, subsection, subdivision, sentence, clause and phrase thereof irrespective of the fact that any one or more sections, subsections, subdivisions, sentences, clauses, or phrases be declared unconstitutional.

"SECTION 5. That the City Clerk shall certify to the adoption of this Ordinance and shall cause the same to be published in the manner prescribed by law."

The trial court did take judicial notice of the ordinance, but the court based its judgment on the language contained in the code prior to its amendment and gave no effect to Ordinance No. 2254.

I

Appellant first argues that the trial court judgment is erroneous because the court did not apply the law as it existed at the time of the judgment. On February 3, 1981, after the court announced its tentative decision, but prior to entry of judgment, the city council enacted Ordinance No. 2254 as an urgency measure to eliminate the interpretation of section 9512, subdivision (2)(c) that had been proposed by the trial court. Although the court granted the city's request for judicial notice, the court's findings of fact and conclusions of law relied on the language of section 9512, subdivision (2)(c) as that section was written prior to the enactment of Ordinance No. 2254, and did not take into account the language of Ordinance No. 2254.[2]

Respondent argues that since the city's complaint dealt with Ordinance No. 2138 and not Ordinance No. 2254, the question of whether No. 2254 is constitutional was not properly before the trial court. We agree. At the time the trial court gave judgment, consideration of the validity of Ordinance No. 2254 was not properly before the trial court. Section 3 of Ordinance No. 2254 provides that by its own terms it becomes operative only "if for any reason any of the special regulations set forth in Section 9512 [enacted by Ordinance No. 2138] hereof are declared invalid as applied to any such use." That was an event which had not occurred.

Nonetheless, inasmuch as we agree with the trial court that Ordinance No. 2138 is in fact unconstitutional on its face,[3] we reach the issue of the validity of the substitute

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[2]The amending Ordinance No. 2254 omitted the phrase "public facility."

[3]The effect of the ordinance is clearly to prohibit the operation of any "adult" business within the city limits. Such an absolute

ordinance (No. 2254). By this decision, Ordinance No. 2254 will become operative. It is settled law that the rights of the parties in an action in equity will be determined on the basis of the law as it exists at the time of the determination, rather than at the time the complaint was filed, and this rule applies to judgments on appeal as well as to judgments in the trial court. (*City & County of S.F. v. Budde* (1956) 139 Cal.App.2d 10, 12 [292 P.2d 955, 294 P.2d 503].) The version of the ordinance in force at the present is the relevant legislation for the purpose of the appeal. It is an established rule of law that on appeals from judgments granting or denying injunctions, the law to be applied is that which is current at the time of judgment in the appellate court. (*Kash Enterprises, Inc. v. City of Los Angeles* (1977) 19 Cal.3d 294, 306, fn. 6 [138 Cal.Rptr. 53, 562 P.2d 1302].)

II

Under the substitute ordinance, the only restrictions on the location of an adult theatre in the city would be that it be in a C-2 or less restrictive zone, not be within 500 feet of a residential zone, or within 1,000 feet of a church, educational institution, park or other adult business.

In *Young v. American Mini Theatres* (1976) 427 U.S. 50, 62, 63 [49 L.Ed.2d. 310, 321, 96 S.Ct. 2440], the court held that the mere fact that the commercial exploitation of material protected by the First Amendment is subject to zoning and other licensing requirements is not sufficient reason for invalidating the ordinance. A zoning ordinance was not held invalid

exclusion is violative of First Amendment rights. (*Schad v. Mount Ephraim* (1981) 452 U.S. 61, 75 [68 L.Ed.2d 671, 684, 101 S.Ct. 2176].)

merely because it regulates activity protected under the First Amendment, where the challenged restriction on the location of adult movies imposed a minimal burden on protected speech. (*Schad v. Mount Ephraim* (1981) 452 U.S. 61 at P. 71 [68 L.Ed.2d 671 at p. 682], analyzing *Young v. American Mini Theatres.*) A zoning law which is alleged to threaten First Amendment rights is subject to close scrutiny to pass constitutional muster and the zoning law affecting the location of adult theatres and bookstores is valid only so long as the zoning law does not have the effect of significantly reducing the numbers and availability to the public. (*Alexander v. City of Minneapolis* (D. Minn. 1982) 531 F.Supp. 1162, 1170.)

In assessing the reasonableness of a regulation, we must weigh heavily the facts and the communication involved; the regulation must be narrowly tailored to further the state's legitimate interest. To be reasonable, time, place and manner restrictions must not only serve significant state interests but must leave open adequate alternative channels of communication. (*Schad v. Mount Ephraim, supra,* 452 U.S. 61, 76 [68 L.Ed.2d 671, 685].) In *Alexander v. City of Minneapolis, supra,* 531 F.Supp. 1162, the zoning ordinance significantly curtailed the public's access to adult books and films and there would not have been a single location in the city for opening of new theatres and bookstores; therefore the Minneapolis zoning ordinance was unconstitutional and went beyond the mere locational restrictions. In *Schad v. Mount Ephraim, supra,* 452 U.S. 61, 75 [68 L.Ed.2d 671, 684], the borough excluded all live entertainment and there was no evidence in the record to support the proposition that the kind of entertainment appellants wished to provide was available in reasonably nearby areas. In *Basiardanes v. City of Galveston* (5th Cir. 1982)

682 F.2d 1203, the zoning ordinance was not reasonable as to time, place and manner where the ordinance banned adult theatres outright from much of the city, few access roads led to permitted locations, and the permissible locations were in undeveloped areas near warehouses and swamps. Galveston's law suppressed speech because it banned adult theatres outright from much of the city by putting them at a greater distance. (682 F.2d 1203, 1214.)

In the case at bench, the zoning ordinance, No. 2254, is reasonable as to time, place and manner if it leaves open alternative channels of communication to the speaker and does not violate the First Amendment. *American Mini Theatres* rejected the notion that dispersal requirements alone muzzle protected speech. (*Basiardanes v. City of Galveston, supra,* 682 F.2d 1203.) If the ordinance merely requires relocation within Whittier and does not ban an adult theatre use, then it will not violate the First Amendment.

In the case at bench, the parties filed a "Stipulation" concerning proffered testimony on the subject of the availability of alternate site for the theatre. The stipulation, among other things, recited that Shawn F. Campell, a named defendant in consolidated action No. SEC 29231, ". . . if sworn as a witness should testify, subject to objection hereinafter stated, as follows: . . ." It then went on to state his proposed testimony.

The stipulation then went on to provide:

"7. That Plaintiff objects, on grounds of relevancy, to the testimony offered in Section 6(a), (b) and (c) of this Stipulation; and

"8. That if the objection above were to be overruled, Plaintiff would call as a witness Elvin H. Porter, who would testify under oath, as follows:

"(a) That he has been the Planning Director of the City of Whittier for over fifteen (15) years; and

"(b) That he is fully familiar with the City's Zoning Regulations and the Zoning Map included therein, and that in his opinion, there are other locations within the boundaries of the City of Whittier, on commercially and industrially zoned properties, where 'adult businesses,' defined as such in the said Zoning Regulations, could be located; . . ."

The stipulation thus provided that city would call Elvin H. Porter as a witness only "if the objection above [on the ground of relevancy] were to be overruled."

That objection was never overruled. In fact, the record on appeal reveals no ruling as to it.

No evidence having been introduced on the crucial issue of the availability of other areas in which the theater might be operated, the matter must be remanded for a hearing and determination of that issue. If the ordinance herein merely disperses adult theatres as in *Young v. American Mini Theatres, supra,* 427 U.S. 50 and does not prevent the entry of new theatres into the market place, (see *Alexander v. City of Minneapolis, supra,* 531 F.Supp. 1162), the ordinance is not unconstitutional as applied, and is a reasonable restriction as to time, place and manner.

III

Respondent argues that the term "adult theatre" is unconstitutionally vague and overbroad. While the term "adult theatre" may be ambiguous in ordinary English usage, it has become part of the American vernacular. Secondly, and more important, the term "adult theatre" is very specifically defined within the ordinance itself, and Whittier's definition of adult theatre is very similar

to the use of the term which was found constitutional in *Pringle v. City of Covina* (1981) 115 Cal.App.3d 151, 155 [171 Cal.Rptr. 251]. Although the *Pringle* court found the ordinance before it to contain some vague language, the *Pringle* court found itself compelled under the decision in *Pryor v. Municipal Court* (1979) 25 Cal.3d 238 [158 Cal.Rptr. 330, 599 P.2d 636] to construe the language narrowly in order to preserve its validity.

More recently in *Kuhns v. Board of Superivsors* (1982) 128 Cal.App.3d 369, 375 [181 Cal.Rptr. 1], the court also accepted a narrow interpretation of statutory language. The term "adult theatre" has been used frequently by the courts to describe a specific kind of entertainment, and the term is neither vague nor overbroad.

IV

Respondent argues that the city failed to prove that Walnut was an "adult theatre" within the meaning of the ordinance. Respondent asserts that the record fails to reveal that a preponderance of the films shown at Walnut's theatre have as their dominant theme the depiction of the ordinance's enumerated sexual activities, in accord with the test set forth in *Pringle v. City of Covina, supra,* 115 Cal.App.3d 151 at page 162.

At the hearing before the city council, Lieutenant Marino testified that he made periodic inspections of the movies at the Walnut theatre, and those movies depicted various acts from which the city council could have concluded that the movies were "adult movies" within the legal meaning of that term.

We can find, in the record before us, no evidence contradictory of the lieutenant's testimony or any attack on his standing as an expert on the subject of "adult

movies." Respondent, represented by experienced counsel, made no effort to attack the lieutenant's testimony, either before the city council or in the trial court. It agreed to submit the case on the record. However, as with the issue of alternative sites, the trial court made no finding on the issue of the character of respondent's theatre. On the record the only finding could be adverse to respondent, but it is entitled to have one made. On remand, the trial court shall make the required finding.

V

Respondent argues that the ordinance is unconstitutional because prior to establishing or conducting an adult theatre, a conditional use permit must be required. The case at bar involves the abatement of a nonconforming use and does not deal with the issuance or denail of a conditional use permit.

VI

Respondent argues that the 120-day amortization period is unreasonable on its face. Zoning ordinances may validly provide for eventual termination of nonconforming property uses without compensation if the ordinance provides for a reasonable amortization period. The party complaining of the zoning legislation has the burden of establishing the unreasonableness of the amortization period and must provide evidence showing the particular period is unreasonable as to him. (*Castner v. City of Oakland* (1982) 129 Cal.App.3d 94 [180 Cal.Rptr. 682].) In the case at bench, respondent has cited us no evidence showing the unreasonableness of the amortization period. While we may agree that 120 days appears to be a very short period of time for respondent to reorganize its operation, we are not in

a position to decide that here. Respondent had the burden of showing that the amortization period was unreasonably short as to it, and did not fulfill its burden.

VII

Respondent argues that the ordinance violates the establishment clause of the First Amendment in requiring an adult theatre to be 1,000 feet from a church, it indorses a religion. Requiring an adult theatre to be 1,000 [feet] from a church does not establish a religion. The prohibition against establishing a religion means the government cannot force or influence a person to go to or remain away from a church (*Everson v. Board of Education* (1964) 330 U.S. 1 [91 L.Ed. 711, 67 S.Ct. 504, 168 A.L.R. 1392]) and the government must remain neutral in matters of religion. In the case at bar, the zoning ordinance herein does not have an impermissible religious purpose and the effect of requiring the adult theatre to move 1,000 feet from a church does not either encourage people to go to church nor discourage people from going to chuch. We cannot say the government has failed to remain neutral in matters of religion. The existence of an adult theatre within 1,000 feet of a church may well affect the sensibilities of some persons who attend a church, but we cannot agree that it will cause a person to go to church or that it will in any way advance a religion. Ordinances with similar locational requirements have been held valid, and we need not unduly lengthen this opinion by discussing those cases further.

The judgment is reversed. On remand, the trial court shall make the necessary rulings on proffered evidence as to the status of the theatre as an "adult theatre" and as to the availability of alternate sites in the City of Whittier, and enter judgment in accordance with this

opinion and such additional findings. Neither party shall recover costs in this court.

Woods, P. J., concurred.

McCLOSKY, J. —I dissent:

I

I agree with the majority that "[i]t is an established rule of law that on appeals from judgments granting or denying injunctions, the law to be applied is that which is current at the time of judgment in the appellate court." (Majority opn., *ante*, p. —; *Kash Enterprises, Inc. v. City of Los Angeles*, (1977) 19 Cal.3d 294, 306, fn. 6 [138 Cal.Rptr. 53, 562 P.2d 1302]; see also *City & County of S. F. v. Budde* (1956) 139 Cal.App.2d 10, 12 [292 P.2d 955] and *Complete Serv. Bur. v. San Diego County Med. Soc.* (1954) 43 Cal.2d 201, 207 [272 P.2d 497].) From that valid principle of law, the majority concludes that we should decide this case on the basis of Ordinance No. 2254. Based upon the fact that Ordinance No. 2254 is *not* the current law, I disagree with that conclusion.

Ordinance No. 2254 was enacted as an urgency measure on February 3, 1981, in response to the trial court's *proposed* interpretation of the original Ordinance No. 2138 (9512, subd. (2)(c)). As the majority notes, the trial court took judicial notice of Ordinance No. 2254, but based its later judgment on the language contained in the origianl Ordinance No. 2138 prior to the enactment of No. 2254.

It is my view that in so doing the trial court was correct. At the time it gave judgment, consideration of the validity of Ordinance No. 2254 was not properly before the trial court and I do not believe that it is

properly before us now. Section 3 of Ordinance No. 2254 provides as follows:

"SECTION 3. That Section 9512.1 is hereby added to the Whittier Municipal Code to read as follows:

" '9512.1 - *ALTERNATE SPECIAL REGULATIONS.* The special regulations set forth in this section *shall apply* to all uses which are subject to the provisions of this part *if for any reason any of the special regulations set forth in Section 9512 hereof are declared invalid as applied to any such use.*" (Italics added.)

At the time the trial court gave its judgment, there was no final judgment or judgment on appeal declaring any of the provisions of section 9512 of Ordinance No. 2138 invalid. The record on appeal reflects no change in that situation to this date. That being so, there was no way the trial court could have properly considered the constitutionality of the provision of Ordinance No. 2254, nor by which we may properly do so now. That ordinance, by its own terms, becomes operative *only* "if for any reason any of the special regulations set forth in Section 5912 [enacted by Ordinance No. 2138] hereof are declared invalid as applied to any such use." That was an event which had not, and to this day has not, occurred.

It is one thing to hold, as *Kash Enterprises* quite properly does, that the relevant law is that which exists at the time of the judgment on appeal. It is quite a different, and in my view an impermissible thing for the majority to hold that it will "reach the issue of the validity of the substitute ordinance (No. 2254)" because "[b]y this decision, Ordinance No. 2254 will become operative." That is a premature leap I am unwilling to take. The flaw in the majority's conclusion is that there is no existing final judgment on appeal declaring the

original Ordinance No. 2138 invalid. (See majority opn., *ante*, p. 640.) Assuming no petition for hearing is filed with the Supreme Court, the earliest the majority's decision could become final—and thus operative—would be 30 days after its filing. There is thus no judgment on appeal that is final or operative now.

II

We are directed by the Supreme Court's order of May 19, 1983, retransferring this matter to us, to reconsider our previous order which precluded "further proceedings to resolve the factual issue posed by paragraphs 6(a) and 8 of the Stipulation of Facts filed November 13, 1979, included at p. 196 of the Clerk's Transcript."

Paragraph 6 of that stipulation, among other things, recited that Shawn F. Campbell, a named defendant in consolidated action No. SEC 29231, ". . . if sworn as a witness should testify, subject to objection hereinafter stated, as follows: . . ."

After stating his proposed testimony, the stipulation then went on to provide:

"7. That Plaintiff objects, on grounds of relevancy, to the testimony offered in Section 6(a), (b) and (c) of this Stipulation; and

"8. That if the objection above were to be overruled, Plaintiff would call as a witness Elvin H. Porter, who would testify under oath, as follows:

"(a) That he has been the Planning Director of the City of Whittier for over fifteen (15) years; and

"(b) That he is fully familiar with the City's Zoning Regulations and the Zoning Map included therein, and that in his opinion, there are other locations within the boundaries of the City of Whittier, on commercially and

industrially zoned properties, where 'adult businesses,' defined as such in the said Zoning Regulations, could be located; . . ."

The stipulation thus provided that city would call Elvin H. Porter as a witness *only* "if the objection above [on the ground of relevancy] were to be overruled." It never was. In fact, as the majority concedes, the record on appeal reveals no ruling as to it. It accordingly follows that, having wavied such ruling below, city may not now rely on the testimony of Elvin H. Porter that it offered only on the non-occurring condition that its objection to Shawn F. Campbell's testimony was overruled. That left the record devoid of any evidence whatsoever to support city's position in regard to location.

I fully agree that the mere fact that the commercial exploitation of material protected by the First Amendment is subject to zoning and other licensing requirements is not sufficient reason for invalidating an ordinance. A zoning ordinance is not invalid merely because it regulates activity protected under the First Amendment, where the challenged restriction on the location of adult movies imposes a *minimal* burden on the protected speech. (*Young v. American Mini Theatres* (1976) 427 U.S. 50, 62, 63 [49 L.Ed.2d 310, 321-322, 96 S.Ct. 2440]; see also *Schad v. Mount Ephraim, supra,* 452 U.S. 61, 71 [68 L.Ed.2d 671, 682].) A zoning law which is alleged to threaten First Amendment rights is, however, subject to close scrutiny to pass constitutional muster. Such zoning law affected the location of adult theatres and bookstores is valid only so long as it does not have the effect of significantly reducing the numbers of such businesses and their availability to the public. (*Alexander v. City of Minneapolis* (D.Minn. 1982) 531 F.Supp. 1162, 1170.)

In assessing the reasonableness of a regulation, the courts must weigh heavily the facts and the communication involved. To be reasonable, the regulation must be narrowly tailored to further the state's legitimate interest and the regulation's time, place and manner restrictions not only must serve significant state interests but must leave open adequate alternative channels of communicaiton. (*Schad v. Mount Ephraim* (1981) 452 U.S. 61, 76 [68 L.Ed.2d 671, 685, 101 S.Ct. 2176].) In *Schad,* the borough excluded all live adult entertainment and there was no evidence in the record to support the proposition that that kind of entertainment was available in reasonably nearby areas. In *Basiardanes v. City of Galveston* (5th Cir. 1982) 682 F.2d 1203, the zoning ordinance was held not reasonable as to time, place and manner where the ordinance banned adult theatres outright from much of the city, few access roads led to permitted locations and the permissible locations were in undeveloped areas near warehouses and swamps. Galveston's law suppressed speech because it banned adult theatres outright from much of the city by putting them at a great distances. (682 F.2d at p. 1214.)

In *Alexander v. City of Minneapolis, supra,* 531 F.Supp. 1162, where the zoning ordinance significantly curtailed the public's access to adult books and films as there would not have been a single location in the city for opening of new theatres and bookstores, the court declared the city's zoning ordinance unconstitutional as going beyond mere locational restrictions.

III

As Walnut's claims are grounded in the First Amendment, city has the burden of overcoming the presumption that the ordinance is invalid because it impinges on freedom of expression. (*Schad v. Mount*

Ephraim, supra, 452 U.S. 61.) The zoning ordinance must be narrowly drawn to further a sufficiently substantial government interest, and unless the ordinance advances significant governmental interests and accomplishes such advancement without undue restraint of speech, the ordinance is invalid. The city must buttress its assertion with evidence that the state interest has a basis in fact and that the factual basis was considered by the city in passing the ordinance. (*Avalon Cinema Corp. v. Thompson,* (8th Cir. 1981) 667 F.2d 659, 661.) The record on appeal in this matter before us fails to support the conclusion that the city sustained its burden of overcoming the presumption of invalidity by proving that the ordinance in question was narrowly drawn, that it advanced a significant governmental interest without undue restraint of speech and that the state interest in fact or that the factual basis was considered by the city in passing the ordinance.

The majority, relying on *County of Sacramento v. Superior Court* (1982) 137 Cal.App.3d 448, 454-455 [187 Cal.Rptr. 154], holds that identical ordinances need not be tested anew each time they are enacted by a different governmental entity by establishing the actual existence of local conditions which would justify it since lawmakers in one locale should not be denied the benefit of the wisdom and experience of lawmakers in another community. From that premise, they conclude that since sociologists and urban planners have testified that a concentration of adult movie theatres in limited areas lead to the deterioration of surrounding neighborhoods (see *Young v. American Mini Theatres, supra,* 427 U.S. 50, 80 [49 L.Ed.2d 310, 332]), City need not bring its own sociologists to apply these observations to the City of Whittier. (See also *Strand Property Corp. v. Municipal Court* (1983) 148 Cal.App.3d 882 — Cal.Rptr. —]).

In my view, we need not decide that question since the necesary factual premise for it is wholly lacking in the case before us. Far from there being any evidence that there was any concentration of adult movie theatres in any part of the City of Whittier or any possibility that there would be any, there was no evidence presented to the trial court that there was more than the one threatre operated by the respondent.

I conclude that the only current existing and operative ordinance was the original Ordinance No. 2138. I agree with the majority that that ordinance is unconstitutional. Moreover I find no competent evidence in the record to support the city's position that there were other available commercially or industrially zoned locations within the city where an adult business of the nature of respondent's could be located.

I therefore see no basis in law or equity for a reversal or for a further remand to the trial court.

I would affirm the judgment.

APPENDIX G

2 - 4 Civil No. 65777

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA
IN BANK

SUPREME COURT
FILED
MAY 10 1983
LAURENCE P. GILL, Clerk
Deputy

CITY OF WHITTIER

v.

WALNUT PROPERTIES, INC.

Petition for hearing GRANTED. The cause is transferred to this court and retransferred to the Court of Appeal, Second District, Division Four, with directions to reconsider on remand its order, which now precludes further proceedings to resolve the factual issue posed by paragraphs 6(a) and 8 of the Stipulation of Facts filed November 13, 1979, included at p. 196 of the Clerk's Transcript. (See Schroeder v. S.L.T.V.G., 60 Cal. 467, 471-472.)

Chief Justice

Justice

Justice

Justice

APPENDIX H

CITY OF WHITTIER, Plaintiff and Appellant, v. WALNUT PROPERTIES, INC., Defendant and Respondent.

[Civ. No. 65777. Second Dist., Div. Four. Feb. 1, 1983.]

[As modified Feb. 15, 1983.]

COUNSEL

Robert Flandrick, City Attorney, Burke, Williams & Sorensen and Virginia R. Pesola for Plaintiff and Appellant.

Stanley Fleishman for Defendant and Respondent.

OPINION

KINGSLEY, J.—This action was filed by City of Whittier to compel Walnut Properties, Inc. to comply with the city's zoning code that regulates "adult businesses."

FACTS

On February 7, 1978, City of Whittier adopted an amendment to its zoning regulations by ordinance No. 2138. The code established locational regulations applicable to adult business establishments within the city. The code declares adult businesses lawfully in existence prior to the effective date of the code to be legal nonconforming uses which are subject to abatement by administrative process.

Walnut owned and operated in the City of Whittier, as part of its "Pussycat" theater chain, what is alleged to be an adult theater.

Pursuant to section 9322, subdivision (3) the superintendent of building and safety issued to Walnut an administrative order of abatement. Walnut appealed

to the city planning commission and objected to the constitutionality of the code. The planning commission issued an order of abatement. Walnut appealed to the city council, which ordered the termination of the "adult theater" use. Walnut failed to comply and the city sued for injunctive relief.

Walnut denied it was an "adult theater" within the ordinance and alleged that the ordinance was unconstitutional. We here determine only the issue of constitutionality. Walnut asked the court to take judicial notice of the fact that it had the only theater in the city which allegedly is an adult theater within the meaning of the ordinance.

The court found that language contained in section 9512, subdivision (2)(c) renders the code unconstitutional[1] in that the langauge prohibited the operation of any "adult business" at any location in the city. The court concluded as follows in conclusions (1) and (2):

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[1]Section 9512, subdivisions (1) and (2) of the code reads in its entirety as follows:

"SECTION 9512—Special Regulations—All uses subject to the provisions of this part shall comply with all of the regulations contained in this chapter, and the following regulations:

"(1) That prior to establishing or conducting of any adult business, a conditional use permit therefor shall be obtained, pursuant to the provisions of Part 8 of this chapter; and

"(2) That no adult business shall be granted a conditional use permit unless the lot upon which such business is proposed to be located:

"(a) Is classified in Zone C-2 or a less restrictive zone; and

"(b) Is not within five hundred (500) feet of any lot classified in any of the R zones; and

"(c) Is not within one thousand (1,000) feet of any lot upon which there is located a church, or educational institution, park or other public facility which is utilized by minors; and

"1. The portion of § 9512(2)(c) of the Whittier Municipal Code specifically the words 'other public facility which is utilized by minors,' has the legal effect of prohibiting the location of any adult business on any location within the City in that, the phrase 'public facility' means, and includes, among other things, any retail commercial facility which is open to members of the public, and is utilized by minors, such as grocery stores and drug stores.

"2. The absolute prohibition of an otherwise lawful business constitutes a violation of the state and federal constitutions and such ordinance is found to be void as applied to the defendant Walnut herein."

Prior to the entry of judgment the city asked the court to take judicial notice of ordinance No. 2254 which was enacted as an urgency measure on February 3, 1981. This was enacted in response to the trial court's proposed interpretation and to clarify any ambiguities. Sections 3, 4, and 5 of ordinance No. 2254 read as follows:

"SECTION 3. That Section 9512.1 is hereby added to the Whittier Municipal Code to read as follows:

" '9512.1—ALTERNATE SPECIAL REGULATIONS. The special regulations set forth in this section shall apply to all uses which are subject to the provisions of this part if for any reason any of the special regulations set forth in Section 9512 hereof are declared invalid as applied to any such use.

" '(1) That prior to establishing or conducting of any adult business, a conditional use permit therefor shall

---

"(d) Is not within one thousand (1,000) feet of any lot on which there is located another adult business; and

"(e) Is not within five hundred (500) feet of any lot upon which is located a business with a type 40, 42, 48 or 61 on-sale alcoholic beverage license. (Ord. No. 2138, § 2, 2-7-78.)"

be obtained, pursuant to the provisions of Part 9 of this chapter; and

" '(2) That no adult business shall be granted a conditional use permit unless the lot upon which such business is proposed to be located:

" '(a) Is classified in Zone C-2 or a less restrictive zone; and

" '(b) Is not within five hundred (500) feet of any lot classified in any of the R zones; and

" '(c) Is not within one thousand (1,000) feet of any lot upon which there is located a church; or

" '(d) Is not within one thousand (1,000) feet of any lot upon which there is located any public, private or parochial, elementary, junior high, high school; or

" '(e) Is not within one thousand (1,000) feet of any lot upon which there is located a City owned, operated and maintained public park; or

" '(f) Is not within one thousand (1,000) feet of any lot on which there is located another adult business; or

" '(g) Is not within five hundred (500) feet of any lot on which is located a business with a type 40, 42, 48 or 61 on sale alcoholic beverage license.'

"SECTION 4. If any section, subsection, subdivision, sentence, clause or phrase of this Ordinance is for any reason held to be unconstitutional or otherwise invalid, such decision shall not affect the validity of the remaining provisions of this Ordinance. The City Council hereby declares that it would have passed this Ordinance and each section, subsection, subdivision, sentence, clause and phrase thereof irrespective of the fact that any one or more sections, subsections, subdivisions, sentences, clauses, or phrases be declared unconstitutional.

"SECTION 5. That the City Clerk shall certify to the adoption of this Ordinance and shall cause the same to be published in the manner prescribed by law."

The trial court did take judicial notice of the ordinance, but the court based its judgment on the language contained in the code prior to its amendment and gave no effect to ordinance No. 2254.

Appellant first argues that the trial court's judgment is erroneous because the court did not apply the law as it existed at the time of judgment. On February 3, 1981, after the court announced its tentative decision, but prior to entry of judgment, the city council enacted ordinance No. 2254 as an urgency measure to eliminate the interpretation of section 9512, subdivision (2)(c) that had been proposed by the trial court. Although the court granted the city's request for judicial notice, the court's findings of fact and conclusions of law relied on the language of section 9512, subdivision (2)(c) as that section was written prior to the enactment of ordinance No. 2254, and did not take into account the language of ordinance No. 2254.[2] Therefore, the appellant is correct that the court did not apply the law as it existed at the time of judgment. The question before us is whether the court was required to consider ordinance No. 2254, considering that the ordinance under which the city filed its complaint for injunctive relief was ordinance No. 2138.

Respondent argues that since the city's complaint dealt with ordinance No. 2138 and not ordinance No. 2254, the question before this court is solely whether ordinance No. 2138 is constitutional, and the question of whether No. 2254 is constitutional was not properly before the

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[2]The amending ordinance No. 2254 omitted the phrase "public facility."

trial court. We do not agree. It is settled law that the rights of the parties in an action in equity will be determined on the basis of the law as it exists at the time of the determination, rather than at the time the complaint was filed, and this rule applies to judgments on appeal as well as to judgments in the trial court. (*City & County of S. F. v. Budde* (1956) 139 Cal.App.2d 10, 12 [292 P.2d 955, 294 P.2d 503].) The version of the ordinance in force at the present is the relevant legislation for the purposes of the appeal. It is an established rule of law that on appeals from judgments granting or denying injunctions, the law to be applied is that which is current at the time of judgment in the appellate court. (*Kash Enterprises, Inc. v. City of Los Angeles* (1977) 19 Cal.3d 294, 306, fn. 6 [138 Cal.Rptr. 53, 562 P.2d 1302].) Repeal or modification of an ordinance under attack, or subsequent legislation may render moot the issues in a pending appeal. By rule of law on appeals from judgments granting or denying injunctions, the law to be applied is that which is current at the time of judgment in the appellate court. (*Callie v. Board of Supervisors* (1969) 1 Cal.App.3d 13, 18 [81 Cal.Rptr. 440].) Thus the trial court erroneously failed to consider ordinance No. 2254, and the language "other public facility" from ordinance No. 9512, subdivision (2)(c) is not relevant in determining the constitutionality of the ordinance, either here or in the trial court.

Thus, the only restrictions on the location of an adult theater in the city would be that it be in a C-2 or less restrictive zone, not be within 500 feet of a residential zone, or within 1,000 feet of a church, educational institution, park or other adult business.

In *Young v. American Mini Theatres* (1976) 427 U.S. 50, 62, 63 [49 L.Ed.2d 310, 321, 322, 96 S.Ct. 2440]

the court held that the mere fact that the commercial exploitation of material protected by the First Amendment is subject to zoning and other licensing requirements is not sufficient reason for invalidating the ordinance. A zoning ordinance was not held invalid merely because it regulates activity protected under the First Amendment, where the challenged restriction on the location of adult movies imposed a minimal burden on protected speech. (*Schad v. Mount Ephraim* (1981) 452 U.S. 61 at p. 71 [68 L.Ed.2d 671 at pp. 681-682, 101 S.Ct. 2176], analyzing *Young v. American Mini Theatres.)* A zoning law which is alleged to threaten First Amendment rights is subject to close scrutiny to pass constitutional muster and the zoning law affecting the location of adult theaters and bookstores is valid only so long as the zoning law does not have the effect of significantly reducing the numbers and availability to the public. (*Alexander v. City of Minneapolis* (D.Minn. 1982) 531 F.Supp. 1162, 1170.)

In assessing the reasonableness of a regulation, we must weigh heavily the facts and the communication involved; the regulation must be narrowly tailored to further the state's legitimate interest. To be reasonable, time, place and manner restrictions not only must serve significant state interests but must leave open adequate alternative channels of communication. (*Schad v. Mount Ephraim, supra,* 452 U.S. 61, 76 [68 L.Ed.2d 671, 685].) In *Alexander v. City of Minneapolis, supra,* 531 F.Supp. 1162, the zoning ordinance significantly curtailed the public's access to adult books and films and there would not have been a single location in the city for opening of new theaters and bookstores; therefore the Minneapolis zoning ordinance was unconstitutional and went beyond the mere locational restrictions. In *Schad v. Mount Ephraim, supra,* 452 U.S. 61, 75 [68 L.Ed.2d

671, 684], the borough excluded all live entertainment and there was no evidence in the record to support the proposition that the kind of entertainment appellants wish to provide is available in reasonably nearby areas. In *Basiardanes v. City of Galveston* (5th Cir. 1982) 682 F.2d 1203, the zoning ordinance was not reasonable as to time, place and manner where the ordinance banned adult theaters outright from much of the city, few access roads led to permitted locations and the permissible locations were in undeveloped areas near warehouses and swamps. Galveston's law suppressed speech because it banned adult theaters outright from much of the city by putting them at a great distance. (682 F.2d 1203, 1214.)

In the case at bench the zoning ordinance, No. 2254, is reasonable as to time, place and manner because it leaves open alternative channels of communication to the speaker and does not violate the First Amendment. *American Mini Theatres* rejected the notion that dispersal requirements alone muzzle protected speech; *Basiardanes v. City of Galveston, supra,* 682 F.2d 1203, and [both] ordinance No. 2254 [and No. 2138] merely require relocation within Whittier and do not ban an adult theater use. In the case at bench there was a stipulation that the director of city planning would have testified as to other locations available to Walnut Theatres. Although it is true that there was no other evidence that there are adult theaters presently within Whittier, and such a fact has been considered significant in *Avalon Cinema Corp. v. Thompson* (8th Cir. 1981) 667 F.2d 659,[3] this is not a case where the city has effectively excluded all of the type of adult entertainment

[3]Since Walnut can relocate and other new adult theaters can locate within the city, we do not find the fact that there are presently no other adult theaters in Whittier to be determinative.

which appellant seeks to sell. (*Schad v. Mount Ephraim, supra,* 452 U.S. 61, 75 [68 L.Ed.2d 671, 684].) According to the inferences properly drawn from the stipulation to testimony, Walnut could relocate within the city, and thus this is not a case where free speech is suppressed by either banning adult theaters outright from much of the city or by putting these theaters at a great distance. (*Basiardanes v. City of Galveston, supra,* 682 F.2d 1203.) Since the ordinance herein merely disperses adult theaters as in *Young v. American Mini Theatres, supra,* 427 U.S. 50 and does not prevent the entry of new theaters into the marketplace, (*see Alexander v. City of Minneapolis, supra,* 531 F.Supp. 1162), the ordinance is not unconstitutional as applied, and is a reasonable restriction as to time, place and manner. We find that the ordinance passes constitutional muster as not being unduly restrictive, since Walnut (and other new adult theaters) can locate at other places within the city.

Respondent argues that the city cannot rely on *Young v. American Mini Theatres, supra,* 427 U.S. 50 to save the ordinance, because in the instant case it will be "virtually impossible" to establish an adult theater in the City of Whittier. As we have stated before, the parties stipulated that the director of planning would testify that there were locations in the city where Walnut could locate, if the ordinance is interpreted in the way we have suggested here.

Respondent argues correctly, that since Walnut's claims are rooted in the First Amendment, the city has the burden of overcoming the presumption that the ordinance is invalid because it impinges on freedom of expression. (*Schad v. Mount Ephraim, supra,* 452 U.S. 61.) The zoning ordinance must be narrowly drawn to further a sufficiently substantial government interest,

and unless the ordinance advances significant governmental interests and accomplishes such advancement without undue restraint of speech, the ordinance is invalid. The city must buttress its assertion with evidence that the state interest has a basis in fact and that the factual basis was considered by the city in passing the ordinance. (*Avalon Cinema Corp. v. Thompson, supra,* 667 F.2d 659, 661.) However, identical ordinances need not be tested anew each time they are enacted by a different governmental entity by establishing the actual existence of local conditions which would justify it ". . . lawmakers in one locale [should not be denied] the benefit of the wisdom and experience of lawmakers in another community, no matter how similar the circumstances; . . ." (See *County of Sacramento v. Superior Court (Goldies Bookstores, Inc.)* (1982) 137 Cal.App.3d 448, 454, 455 [187 Cal.Rptr. 154].) The "factual basis" behind certain types of zoning laws, insofar as those zoning laws require dispersal or deconcentration, has been developed by testimony in other cases. Sociologists and urban planners have testified that a concentration of adult movie theaters in limited areas leads to the deterioration of surrounding neighborhoods. (See *Young v. American Mini Theatres, supra,* 427 U.S. 50 at p. 80 [49 L.Ed.2d 310 at pp. 331-332].) This testimony is sufficient and the city need not bring their own sociologists to apply these observations to the City of Whittier.

However, two other tests remain. The regulations must be motivated not by a distaste for the speech itself, but by a desire to eliminate its adverse effects and the legislation may not severely restrict First Amendment rights. (91 Harv.L.Rev. 1427, 1558-1559.) In view of the fact that the ordinance merely would have the effect of scattering or relocating adult theaters in the City of

Whittier, and would not ban that form of entertainment, either absolutely or pragmatically, the zoning regulation neither unduly restricts First Amendment rights nor can it fairly be considered to be motivated by a distaste for the speech itself. It appears that the ordinances in question were motivated by an attempt to reduce neighborhood blight and not by a distaste for the speech. Appellant has sustained its burden of proof.

Respondent argues that the term "adult theater" is unconstitutionally vague and overbroad. While the term "adult theater" may be ambiguous in ordinary English usage, it has become part of the American vernacular. Secondly, and more important, the term "adult theater" is very specifically defined within the ordinance itself, and Whittier's definition of adult theater is very similar to the use of the term which was found constitutional in *Pringle v. City of Covina* (1981) 115 Cal.App.3d 151, 155 [171 Cal.Rptr. 251]. Although the *Pringle* court found the ordinance before it to contain some vague language, the *Pringle* court found itself compelled under the decision in *Pryor v. Municipal Court* (1979) 25 Cal.3d 238 [158 Cal.Rptr. 330, 599 P.2d 636] to construe the language narrowly in order to preserve its validity.

More recently in *Kuhns v. Board of Supervisors* (1982) 128 Cal.App.3d 369, 375 [181 Cal.Rptr. 1], the court also accepted a narrow interpretation of statutory language. The term "adult theater" has been used frequently by the courts to describe a specific kind of entertainment, and the term is neither vague nor overbroad.

Respondent argues that the city failed to prove that Walnut was an "adult theater" within the meaning of the ordinance. Respondent asserts that the record fails to reveal that a preponderance of the films shown at

Walnut's theater have as their dominant theme the depiction of the ordinance's enumerated sexual activities, in accord with the test set forth in *Pringle v. City of Covina, supra,* 115 Cal.App.3d 151 at page 162.

At the hearing before the city council, Lieutenant Marino testified that he made periodic inspections of the movies at the Walnut theater, and these movies depicted various acts from which the city council could have concluded that the movies were "adult movies" within the legal meaning of that term.

Respondent argues that the ordinance is unconstitutional because prior to establishing or conducting an adult theater, a conditional use permit must be required. The case at bar involves the abatement of a nonconforming use and does not deal with the issuance or denial of a conditional use permit.

Respondent argues that the 120-day amortization period is unreasonble on its face. Zoning ordinances may validly provide for eventual termination of nonconforming property uses without compensation if the ordinance provides for a reasonable amortization period. The party complaining of the zoning legislation has the burden of establishing the unreasonableness of the amortization period and must provide evidence showing the particular period is unreasonable as to him. (*Castner v. City of Oakland* (1982) 129 Cal.App.3d 94 [180 Cal.Rptr. 682].) In the case at bench respondent has cited us no evidence showing the unreasonableness of the amortization period. While we may agree that 120 days appears to be a very short period of time for respondent to reorganize its operation, we are not in a position to decide that here. Respondent had the burden of showing that the amortization period was unreasonably short as to it, and it did not fulfill its burden.

Respondent argues that the ordinance violates the establishment clause of the First Amendment in that requiring an adult theater to be 1,000 feet from a church endorses a religion. Requiring an adult theater to be 1,000 feet from a church does not establish a religion. The prohibition against establishing a religion means the government cannot force or influence a person to go to or remain away from a church (*Everson v. Board of Education* (1947) 330 U.S. 1, 15 [91 L.Ed. 711, 723, 67 S.Ct. 504, 511]), and the government must remain neutral in matters of religion. In the case at bar, the zoning ordinance herein does not have an impermissible religious purpose and the effect of requiring the adult theater to move 1,000 feet from a church does not either encourage people to go to church nor discourage people from going to church. We cannot say the government has failed to remain neutral in matters of religion. The existence of an adult theater within 1,000 feet of a church may well effect the sensibilities of some persons who attend a church, but we cannot agree that it will cause a person to go to church or that it will in any way advance a religion. Ordinances with similar locational requirements have been held valid, and we need not unduly lengthen this opinion by discussing those cases further.

The judgment is reversed. The case is remanded for such further proceedings as may be necessary to determine the issue of whether the theater in question is, in fact, an "adult" theater within the meaning of the ordinance now involved.

Woods, P.J., and McClosky, J., concurred.

APPENDIX I

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Attorney for Defendant
WALNUT PROPERTIES, INC.

ENTERED FILED

APR 1 1981

MAR 24 1981

JOHN J. CORCORAN, COUNTY CLERK
BOOK SE C 29 PAGE 205

JOHN J. [illegible], COUNTY CLERK
BY L. COLEMAN, DEPUTY

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

CITY OF WHITTIER, a Charter City, Plaintiff, vs. WALNUT PROPERTIES, INC., and DOES I through XX, inclusive, Defendants.	NO. SE C 29232 JUDGMENT

The Court having signed the Findings of Fact and Conclusions of Law herein.

IT IS ORDERED that the complaint against Walnut Properties, Inc. is dismissed with cost to Walnut Properties, Inc.

DATED: March 24, 1981

VINCENT S. DALSIMER, JUDGE
LOS ANGELES SUPERIOR COURT

APPENDIX J

LAW OFFICES
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RECD SF
MAR 5 - 1981

FILED
MAR 24 1981
JOHN A. [illegible], COUNTY CLERK
BY L. COLEMAN, DEPUTY

Attorney for Defendant
WALNUT PROPERTIES, INC.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

CITY OF WHITTIER, a Charter City, Plaintiff, vs. WALNUT PROPERTIES, INC., and DOES I through XX, inclusive, Defendants.	NO. SE C 29232 FINDINGS OF FACT AND CONCLUSIONS OF LAW DEPT A

The case was heard on January 28, 1981 by the Honorable Vincent S. Dalsimer, Robert Flanderick appearing for the plaintiff, and Stanley Fleishman appearing for the defendant Walnut Properties, Inc. The Court, having heard the parties, and considered all the papers on file, makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Plaintiff, City of Whittier ("City") was at all times herein mentioned a Charter City within the meaning

of § 34101 of the Government Code, and is organized and existing under and by virtue of the Constitution of the State of California.

2. Defendant, Walnut Properties, Inc. ("Walnut"), is a corporation organized and existing under and by virtue of the laws of the State of California.

3. At all times herein mentioned Walnut operated and conducted a motion picture theater located at 7038 Greenleaf Avenue, City of Whittier, County of Los Angeles, State of California. The property is zoned for use by a theater.

4. At all times herein mentioned, the City had in effect certain ordinances which provided a method of abatement for legal nonconforming uses of property within the City, and an "Adult Entertainment" ordinance purporting to establish zoning regulations applicable to "Adult Businesses." Said ordinances were judicially noticed by the Court at the time of trial. The "Adult Entertainment" ordinance provides, *inter alia,* that prior to establishing or conducting any adult business a conditional use permit shall be obtained, and that no adult business shall be granted a conditional use permit unless the lot upon which such business is proposed to be located "is not within 1,000 feet of any lot upon which there is located a church, or educational institution, or park, or other public facility which is utilized by minors."

5. On or about July 25, 1978, the Superintendent of Building Inspection of the City advised Walnut that, pursuant to the "Adult Entertainment" ordinance, it was required to modify the existing business so that the same would no longer be an adult business as defined in the ordinance. Walnut appealed the decision of the

Superintendent. The Planning Commission, and subsequently the City Council, upheld the decision of the Supertinendent.

6. Walnut denied that it operated an adult theater as defined in the ordinance and alleged by way of affirmative defense that the ordinance, on its face, and as construed and applied to Walnut, violated the free speech, due process and equal protection provisions of the federal and state constitutions.

CONCLUSIONS OF LAW

1. The portion of § 9512(2)(c) of the Whittier Municipal Code specifically the words "other public facility which is utilized by minors," has the legal effect of prohibiting the location of any adult business on any location within the City in that, the phrase "public facility" means, and includes, among other things, any retail commercial facility which is open to members of the public, and is utilized by minors, such as grocery stores and drug stores.

2. The absolute prohibiton of an otherwise lawful business constitutes a violation of the state and federal constitutions and such ordinance is found to be void as applied to the defendant Walnut herein.

3. Walnut is entitled to a judgment dismissing the complaint against it.

DATED: _____, 1981



VINCENT S. DALSIMER, JUDGE
LOS ANGELES SUPERIOR COURT

APPENDIX K

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Nos. 84-5755, 84-6087
D.C. No. CV 81-2262-R

WALNUT PROPERTIES INC., a California corporation, et al.,

Plaintiffs/Appellees,

v.

CITY OF WHITTIER, a charter city, et al.,

Defendants/Appellants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

To PHILIP B. WINBERRY, Clerk of this Court:

NOTICE IS HEREBY GIVEN that the City of Whittier, et al., Appellants above-named, hereby appeals to the Supreme Court of the United States from the judgment entered in this action on September 30, 1985.

This appeal is taken pursuant to 28 U.S.C. § 1254(2).

DATED this 20th day of November 1985.

J. ROBERT FLANDRICK, CITY ATTORNEY
CITY OF WHITTIER; and
BURKE, WILLIAMS & SORENSEN

By _____
J. Robert Flandrick
Attorneys for City of Whittier, et al.

APPENDIX L

ORDINANCE NO: 2327

ORDINANCE OF THE CITY COUNCIL OF THE CITY OF WHITTIER ADOPTING CERTAIN ZONING REGULATIONS RELATING TO ADULT BUSINESSES (APPLICANT: CITY INITIATED; CASE NO: 353.049)

THE CITY COUNCIL OF THE CITY OF WHITTIER DOES ORDAIN AS FOLLOWS:

SECTION 1. That the City Council of the City of Whittier does hereby find, determine and declare, as follows:

(a) That in certain pending litigation, a Federal District Court has determined that the City's Zoning Regulations applicable to adult businesses are valid, with the single exception which is hereinafter described; and

(b) That the Federal District Court's determination of validity, excepted therefrom that provision of the Zoning Regulations which prohibit the location of an adult business within 1,000 ft. of a church; and

(c) That the reason assigned by the Court for such invalidity was that at the time of the original hearings before the Planning Commission and City Council in 1977 and 1978 there was insufficient evidence to justify the conclusion that such a separation between uses was necessary or required; and

(d) That notwithstanding the fact that the portion of the Judgment declaring the provision invalid has been appealed, which appeal is now pending, on the advice of the City Attorney, the City instituted proceedings before the Planning Commission and

City Council, in the time and manner provided by law, to determine whether or not the 1,000 ft. separation should be readopted and placed in the City's Zoning Regulations; and

(e) That the Planning Commission has conducted duly noticed public hearings on said matter and has recommended that the 1,000 ft. limitation be readopted based upon evidence presented by the staff and others to the Commission; and

(f) That this City Council has conducted a duly noticed public hearing upon such matter and based upon the evidence presented, including, but not limited to, the Staff Report and oral testimony presented, and based upon the recommendations of the Planning Commission, including the Planning Commission's file with reference to said recommendation, it appears to the City Council that there is adequate need and evidentiary justification for the imposition of the 1,000 ft. limitation so as to prevent an irreconcilable incompatibility of uses, vis-a-vis, churches and adult businesses located within this City; and

(g) That the public interest, convenience and necessity require the enactment of this Ordinance containing the Regulation relating to the separation of uses as hereinabove described.

SECTION 2. That subsection (c) of subdivision (2) of Section 9512.1 of the Whittier Municipal Code is hereby readopted and reenacted to read as follows:

"(c) Is not located within 1,000 ft. of any lot upon which is located a church; or"

SECTION 3. That the California Environmental Quality Act, as amended, has been complied with with respect

to this proceeding. The City Council and Planning Commission have reviewed and considered the environmental studies conducted and have concluded that a negative declaration is appropriate and proper with respect to this project. That the said declaration be, and hereby is, approved and ordered filed.

SECTION 4. That the City Clerk shall certify the adoption of this Ordinance and cause the same to be published in the manner prescribed by law.

PASSED AND APPROVED THIS 22nd day of May, 1984.

/S/ Myron D. Claxton

MYRON D. CLAXTON, Mayor

ATTEST:

/S/ Sandra Max

SANDRA MAX, Deputy City Clerk

APPENDIX M

ORDINANCE NO. 2257

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF WHITTIER ENACTING CERTAIN PROVISIONS RELATING TO ADULT BUSINESSES.

THE CITY COUNCIL OF THE CITY OF WHITTIER DOES ORDAIN AS FOLLOWS:

SECTION 1. That the City Council of the City of Whittier does hereby find, determine and declare as follows:

(a) That this City Council heretofore enacted certain zoning regulations applicable to "adult businesses;" and

(b) That, in part, said regulations prohibiting the placement of adult businesses within certain distances of residentially zoned properties, and within certain distances of churches, schools, parks and other kinds of publicly owned facilities; and

(c) That the City Council has been advised that a Judge of the Superior Court has found that one portion of said regulations, in his opinion, violates various constitutional precepts, and thus, is void; and

(d) That in order to prevent such purported invalidity from affecting the overall integrity and intended effect of the adult business regulations, as enacted, it is necessary that the City Council enact this measure to eliminate any ambiguity in the said zoning regulations applicable to adult businesses; and

(e) That the enactment of this Ordinance is required for the preservation of the public peace, health and safety.

SECTION 2. That Section 9512.1 is hereby added to the Whittier Municipal Code to read as follows:

"9512.1 - *ALTERNATE SPECIAL REGULATIONS.* The special regulations set forth in this section shall apply to all uses which are subject to the provisions of this part if for any reason any of the special regulations set forth in Section 9512 hereof are declared invalid as applied to any such use.

(1) That prior to establishing or conducting of any adult business, a conditional use permit therefor shall be obtained, pursuant to the provisions of Part 8 of this chapter; and

(2) That no adult business shall be granted a conditional use permit unless the lot upon which such business is proposed to be located:

(a) is classified in Zone C-2 or a less restrictive zone; and

(b) is not within five hundred (500) feet of any lot classified in any of the R Zones; and

(c) is not within one thousand (1,000) feet of any lot upon which there is located a church; or

(d) is not within one thousand (1,000) feet of any lot upon which there is located any public, private or parochial, elementary, junior high, high school; or

(e) is not within one thousand (1,000) feet of any lot upon which there is located a City owned, operated and maintained public park; or

(f) is not within one thousand (1,000) feet of any lot on which there is located another adult business; or

(g) is not within five hundred (500) feet of any lot on which is located a business with a type 40, 42, 48 and 61 on sale alcoholic beverage license."

SECTION 3. If any section, subsection, subdivision, sentence, clause or phrase of this Ordinance is for any reason held to be unconstitutional or otherwise invalid, such decision shall not affect the validity of the remaining provisions of this Ordinance. The City Council hereby declares that it would have passed this Ordinance and each section, subsection, subdivision, sentence, clause and phrase thereof irrespective of the fact that any one or more sections, subsections, subdivisions, sentences, clauses, or phrases be declared unconstitutional.

SECTION 4. That the City Clerk shall certify to the adoption of this Ordinance and shall cause the same to be published in the manner prescribed by law.

PASSED AND APPROVED this 24th day of March, 1981.

/S/ Victor A. Lopez
VICTOR A. LOPEZ, Mayor

ATTEST:

/S/ Jenny Young
JENNY YOUNG, City Clerk

APPENDIX N

ORDINANCE NO. 2254

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF WHITTIER ENACTING CERTAIN PROVISIONS RELATING TO ADULT BUSINESSES. (URGENCY MEASURE)

THE CITY COUNCIL OF THE CITY OF WHITTIER DOES ORDAIN AS FOLLOWS:

SECTION 1. That the City Council of the City of Whittier does hereby find, determine and declare as follows:

(a) That this City Council heretofore enacted certain zoning regulations applicable to "adult businesses"; and

(b) That, in part, said regulations prohibiting the placement of adult businesses within certain distances of residentially zoned properties, and within certain distances of churches, schools, parks, and other kinds of publicly owned facilities; and

(c) That the City Council has been advised that a Judge of the Superior Court has found that one portion of said regulations, in his opinion, violates various constitutional precepts, and thus, is void; and

(d) That in order to prevent such purported invalidity from affecting the overall integrity and intended effect of the adult business regulations, as enacted, it is necessary that the City Council enact this measure, as an urgency ordinance, to eliminate any ambiguity in the said zoning regulations applicable to adult businesses; and

(e) That the immediate enactment of this Ordinance is required for the preservation of the public peace, health and safety; and

(f) That time does not permit the following of the procedures necessary for the adoption of zoning regulations, as described in Section 65800 et seq. of the Government Code, and that this urgency measure is necessary, and authorized by law, to protect the public safety, health and welfare by prohibiting uses which may be in conflict with the contemplated zoning proposal, as is hereinafter described in this Ordinance; and

(g) That the Planning Commission and the Planning staff are hereby instructed to forthwith take the steps necessary to set for public hearing the consideration of regulations which eliminate the possibility of invalidity insofar as the adult regulations are concerned.

SECTION 2. That this Ordinance is hereby declared to be an urgency measure and shall take effect immediately upon its adoption. That a statement of facts constituting the basis of such urgency is as set forth hereinabove. That this Ordinance shall be in full force and effect for a period of One Hundred Twenty (120) days from and after the date of its enactment.

SECTION 3. That Section 9512.1 is hereby added to the Whittier Municipal Code to read as follows:

"9512.1 - *ALTERNATE SPECIAL REGULATIONS.* The special regulations set forth in this section shall apply to all uses which are subject to the provisions of this part if for any reason any of the special regulations set forth in Section 9512 hereof are declared invalid as applied to any such use.

(1) That prior to establishing or conducting of any adult business, a conditional use permit

therefor shall be obtained, pursuant to the provisions of Part 9 of this chapter; and

(2) That no adult business shall be granted a conditional use permit unless the lot upon which such business is proposed to be located:

(a) Is classified in Zone C-2 or a less restrictive zone; and

(b) Is not within five hundred (500) feet of any lot classified in any of the R Zones; and

(c) Is not within one thousand (1,000) feet of any lot upon which there is located a church; or

(d) Is not within one thousand (1,000) feet of any lot upon which there is located any public, private or parochial, elementary, junior high, high school; or

(e) Is not within one thousand (1,000) feet of any lot upon which there is located a City owned, operated and maintained public park; or

(f) Is not within one thousand (1,000) feet of any lot on which there is located another adult business; or

(g) Is not within five hundred (500) feet of any lot on which is located a business with a type 40, 42, 48 or 61 on sale alcoholic beverage license."

SECTION 4. If any section, subsection, subdivision, sentence, clause or phrase of this Ordinance is for any reason held to be unconstitutional or otherwise invalid, such decision shall not affect the validity of the remaining

provisions of this Ordinance. The City Council hereby declares that it would have passed this Ordinance and each section, subsection, subdivision, sentence, clause and phrase thereof irrespective of the fact that any one or more sections, subsections, subdivisions, sentences, clauses, or phrases be declared unconstitutional.

SECTION 5. That the City Clerk shall certify to the adoption of this Ordinance and shall cause the same to be published in the manner prescribed by law.

PASSED AND APPROVED this 3rd day of February, 1981.

/S/ Victor A. Lopez
VICTOR A. LOPEZ, MAYOR

ATTEST:

/S/ Jenny Young
JENNY YOUNG, City Clerk

APPENDIX O

ORDINANCE NO. 2138

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF WHITTIER ADDING PART 20 TO CHAPTER 1, ARTICLE IX, OF THE WHITTIER MUNICIPAL CODE AND AMENDING SECTIONS 9201, 9260 AND 9322 OF SAID CODE, REGULATING AND CONTROLLING ADULT BUSINESSES.

THE CITY COUNCIL OF THE CITY OF WHITTIER DOES ORDAIN AS FOLLOWS:

SECTION 1. That the City Council of the City of Whittier does hereby find, determine, and declare as follows:

(a) That certain businesses, hereinafter defined and described as "adult businesses," are located, and are proposed for location, within areas of the City which are zoned for commercial uses, and are immediately adjacent to residential areas; and

(b) That experience in this City, as well as in other portions of Southern California, and other areas, has demonstrated that such uses, when located in immediate proximity to one another, have operational characteristics which have a deleterious effect on immediately adjacent residential and commercial areas; and

(c) That the concentration of such uses substantially contributes to blighting and downgrading of adjacent commercial and residential areas; and

(d) That it is evident that special zoning regulations applicable to these and similar uses, are necessary to preserve the integrity of existing commercial areas of the City, and of residential areas which are in close proximity to such commercial areas; and

(e) That the public interest, convenience, necessity, and the general welfare of the City requires that such special zoning regulations be enacted.

SECTION 2. That Part 20 be, and is hereby, added to Article IX, Chapter 1 of the Whittier Municipal Code, consisting of Sections 9510 through 9513, inclusive, to read, respectively, as follows:

PART 20 - ADULT BUSINESSES

SECTION 9510. *Purpose* -- The purpose of the adoption of the provisions of this Part is to establish a comprehensive set of regulations applicable to adult businesses and similar and related uses.

SECTION 9511. *Definition* - In addition to the definitions contained in Section 9110 et seq., of this Chapter, the following words and phrases shall, for the purposes of this Part, be defined as follows, unless it is clearly apparent from the context that another meaning is intended:

1. *"Adult Book Store"* shall mean an establishment having as a substantial or significant portion of its stock in trade, material which is distinguished or characterized by its emphasis on matter depicting, describing, or related to specified sexual activity or specified anatomical areas, or an establishment with a segment or section thereof devoted to the sale or display of such material.

2. *"Adult Business"* shall mean any business which is conducted exclusively for the patronage of adults, and as to which minors are specifically excluded from patronage thereat, either by law or by the operators of such business. "Adult Business" shall

also mean and include adult book stores, adult theaters, massage parlors, and modeling studios, adult motels or hotels, but not including those uses or activities, the regulations of which is preempted by State law.

3. *"Adult Hotel/Motel"* shall mean a hotel or motel, as defined in Section 9111(H) and (M) of this Code, which provides, through closed circuit television, or other media, material which is distinguished or characterized by the emphasis on matter depicting or describing or related to specified sexual activities or specified anatomical areas.

4. *"Adult Theater"* shall mean a theater which presents live entertainment or motion pictures or slide photographs, which are distinguished or characterized by their emphasis on matter depicting, describing, or relating to specified sexual activity or specified anatomical areas.

5. *"Material"* relative to adult businesses, shall mean and include, but not be limited to, accessories, books, magazines, photographs, prints, drawings, paintings, motion pictures, and pamphlets, or any combination thereof.

6. *"Massage Parlor"* shall mean any establishment required to be licensed pursuant to Section 6280 et seq., of the Whittier Municipal Code.

7. *"Modeling Studio"* shall mean any establishment or business which provides for members of the public, the services of a live human model for the purpose of reproducing the human body, wholly or partially in the nude, by means of photography, painting, sketching, drawing, or other pictorial form.

8. *"Specified Anatomical Areas"* shall mean:

(a) less than completely and opaquely covered:

(i) human genitals, pubic region;

(ii) buttock, and

(iii) female breast below a point immediately above the top of the areola; and

(b) human male genitals in a discernibly turgid state, even if completely and opaquely covered.

9. *"Specified Sexual Activities"* shall mean:

(a) human genitals in a state of sexual stimulation or arousal; and/or

(b) acts of human masturbation, sexual stimulation or arousal; and/or

(c) fondling or other erotic touching of human genitals, pubic region, buttock, or female breast.

SECTION 9512. *Special Regulations* - All uses subject to the provisions of this Part shall comply with all of the regulations contained in this Chapter, and the following regulations:

1. that prior to establishing or conducting of any adult business, a conditional use permit therefor shall be obtained, pursuant to the provisions of Part 8 of this Chapter; and

2. that no adult business shall be granted a conditional use permit unless the lot upon which such business is proposed to be located:

(a) is classified in zone C-2 or a less restrictive zone; and

(b) is not within 500 feet of any lot classified in any of the R zones; and

(c) is not within 1,000 feet of any lot upon which there is located a church, or educational institution, park, or other public facility which is utilized by minors; and

(d) is not within 1,000 feet of any lot on which there is located another adult business; and

(e) is not within 500 feet of any lot upon which is located a business with a type 40, 42, 48, or 61 on-sale alcoholic beverage license.

SECTION 9513. *Nonconforming Adult Businesses* - All adult businesses which were lawfully in existence as of the effective date of Ordinance No. 2138, and which were rendered nonconforming by the application thereto of the provisions of this Part, shall be subject to abatement in the times and manner set forth in Part 10 hereof.

SECTION 3. That subsection 9 of Section 9260 of the Whittier Municipal Code be amended by adding subparagraph (bb) to read:

(bb) Adult business, subject to the provisions of Part 20 of these regulations.

SECTION 4. That subsection 2 of Section 9322 of the Whittier Municipal Code is hereby amended by adding thereto, as subparagraphs (l) and (m), the following:

(l) Adult book stores and adult theaters, in existence as of the effective date of Ordinance No. 2138, 120 days after the effective date of said Ordinance No. 2138.

(m) Adult businesses, lawfully in existence as of the effective date of Ordinance No. 2138, other than

those referred to in subsection (1) hereof, a period of 18 months after the effective date of said Ordinance No. 2138.

SECTION 5. That subparagraph (55) of Section 9201 of the Whittier Municipal Code is hereby deleted.

SECTION 6. That the City Council has considered the initial study conducted with respect to the matter above described. The City Council has, as a result of its said consideration, and the evidence presented at the hearings on the said matter, determined that the negative declaration as heretofore filed and proposed as a result of the said initial study, is appropriate, and does hereby find that the said negative declaration has been prepared and considered pursuant to the provisions of the California Environmental Quality Control Act of 1970, as amended, and does hereby approve the said negative declaration.

SECTION 7. *Severability* - If any section, subsection, sentence, clause, phrase or portion of this Ordinance is for any reason held to be invalid or unconstitutional by the decision of any court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this Ordinance. The Council hereby declares that it would have adopted this Ordinance and each section, subsection, sentence, clause, phrase, or portion thereof, irrespective of the fact that any one or more sections, subsections, phrases, or portions be declared invalid or unconstitutional. If for any reason this Ordinance or any part thereof should be declared invalid or unconstitutional, then the original ordinance, or ordinances, which this Ordinance, or part thereof, supersedes shall be in full force and effect.

SECTION 8. That the City Clerk shall certify to the adoption of this Ordinance and cause the same to be published in the manner prescribed by law.

APPROVED and ADOPTED this 7th day of February, 1978.

/S/ Jack Mele

JACK MELE, MAYOR

ATTEST:

/S/ Jenny Young

JENNY YOUNG, CITY CLERK

APPENDIX P

ORDINANCE NO. 2121.

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF WHITTIER EXTENDING THE TERM OF ORDINANCE NO. 2116 FOR A PERIOD OF EIGHT (8) MONTHS. (URGENCY MEASURE)

THE CITY COUNCIL OF THE CITY OF WHITTIER DOES ORDAIN AS FOLLOWS:

SECTION 1. That the City Council of the City of Whittier does hereby find, determine and declare as follows:

(a) That on or about June 21, 1977, this City Council enacted Ordinance No. 2116, which had the effect of imposing, as an urgency measure, certain zoning regulations pertaining to adult businesses, as therein described; and

(b) That the said Ordinance required that the Planning staff and Planning Commission conduct a full and complete study for the purpose of recommending to the City Council final and permanent zoning regulations to be applied to such adult businesses; and

(c) That this City Council is in receipt of a Staff Report indicating that such study, although pursued with due diligence, has yet to be completed and that additional time is required therefor, due to the complexity of such study; and

(d) That said Ordinance No. 2116 will expire, prior to the completion of such study, unless the same is, pursuant to law, extended for an additional period of eight (8) months; and

(e) That the facts and circumstances as recited in said Ordinance No. 2116 still obtain, and the

said regulations as imposed by said Ordinance are still required for the reasons therein stated; and

(f) That a duly noticed public hearing was conducted by the said City Council for the purpose of considering whether the facts were such as to warrant the extension, for a period of eight (8) months, of the terms and provisions of said Ordinance No. 2116; and based upon the evidence presented at said hearing, it appears that such extension of time is warranted and required in order to protect the public peace, health and safety and to promote the public interest, convenience and necessity.

SECTION 2. That the terms and provisions as set forth in said Ordinance No. 2116 are hereby re-enacted and readopted and the said ordinance is hereby extended for a period of eight (8) calendar months from and after the date of adoption of this ordinance. This ordinance is hereby declared to be an urgency measure and shall take effect immediately upon its adoption. A statement of facts constituting its urgency is as set forth above.

SECTION 3. That the City Clerk shall cause this ordinance to be published in the manner prescribed by law.

PASSED and APPROVED this 11th day of October, 1977.

/S/ Jack Mele

JACK MELE, MAYOR

ATTEST:

/S/ Jenny Young

City Clerk

CITY OF WHITTIER)
) SS
STATE OF CALIFORNIA)

I, Jenny Young, City Clerk in and for the City of Whittier, California, hereby certify that the above and foregoing is a true and correct copy of Ordinance No. 2121, adopted by the City Council of the City of Whittier in regular session, Tuesday, the 11th day of October, 1977, and that same was passed by the following vote:

Ayes:	J. E. McDonald	R. L. Henderson
	B. P. Sanborn	J. A. Mele
Noes:	None	
Absent:	D. L. Murphy	

WITNESS my hand and the official seal of the City of Whittier this 12th day of October, 1977.

/S/ Jenny Young

JENNY YOUNG, City Clerk

Published according to law, October 18, 1977.

APPENDIX Q

ORDINANCE NO. 2116

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF WHITTIER RELATING TO THE REGULATION AND CONTROL OF CERTAIN ADULT BUSINESSES (URGENCY MEASURE).

THE CITY COUNCIL OF THE CITY OF WHITTIER DOES ORDAIN AS FOLLOWS:

SECTION 1. That the City Council of the City of Whittier does hereby find, determine and declare as follows:

(a) That this City Council has been advised that certain adult businesses, as hereinafter defined and described, have been proposed to be located within areas of the City which are zoned for commercial uses, and are adjacent to residential areas; and

(b) That experience in this City, as well as in other portions of Los Angeles County, have demonstrated that such uses have objectionable operational characteristics which have a deleterious effect upon immediately adjacent residential and commercial areas; and

(c) That a concentration of such uses contributes to blighting or downgrading commercial areas; and

(d) That such concentration also has the effect of blighting adjacent residential areas; and

(e) That it appears that special zoning regulations applicable to these and other similar uses is necessary to preserve the integrity of the existing commercial areas of the City, and of residential areas which are located in proximity to such commercial areas; and

(f) That to allow such uses to be located in such areas without any interim regulations and control could have the effect of frustrating the contemplated zoning proposal, as above described; and

(g) That this Ordinance is immediately required to preserve such commercial and residential areas from the possible effect of blighting or downgrading, during such period of time as may be reasonably necessary to permit the City's Planning Department and Planning Commission to make a complete study and review as to precisely the nature of permanent zoning regulations to be imposed in order to protect such commercial and residental areas within the City, from a blighting or downgrading effect; and

(h) That the public interest, convenience and necessity require that this Ordinance be immediately adopted for the reasons above set forth.

SECTION 2. That notwithstanding any other provision of the Whittier Zoning Regulations, during such time as this Ordinance is in full force and effect, the uses hereinafter referred to shall be prohibited, except as herein provided:

(a) *DEFINITIONS*: For the purpose of this Ordinance, the phrases hereinafter set forth, shall be defined as follows:

(1) "Adult Book Store" shall mean an establishment having as a substantial or significant portion of its stock in trade, material which is distinguished or characterized by its emphasis on matter depicting, describing or relating to specified sexual activity or specified anaotmical areas, or an establishment with a segment or section thereof devoted to the sale or display of such material.

(2) "Adult Business" shall mean and include an adult book store or adult theater.

(3) "Adult Theater" shall mean a theater which presents live entertainment or motion pictures or slide photographs, which are distinguished or characterized, by their emphasis on matter depicting, describing or relating to specified sexual activity or specified anatomical areas.

(4) "Material" shall mean, and include, but not be limited to, books, magazines, photographs, prints, drawings, or paintings, motion pictures, and pamphlets, or any combination thereof.

(5) "Specified Anatomical Areas" shall mean:

(a) less than completely and opaquely covered:

(i) human genitals, pubic region;

(ii) buttock, and

(iii) female breast below a point immediately above the top of the areola; and

(b) human male genitals in a discernibly turgid state, even if completely and opaquely covered.

(6) "Specified Sexual Activities" shall mean:

(a) human genitals in a state of sexual stimulation or arousal; and/or

(b) acts of human masturbation, sexual stimulation or arousal; and/or

(c) fondling or other erotic touching of human genitals, pubic region, buttock or female breast.

(b) *PROHIBITION OF CERTAIN USES.* That from and after the adoption of this Ordinance, no person shall establish or conduct, or permit to be established or conducted, upon any real property located within the City, an adult business, except in accordance with the provisions of this Ordinance.

(c) *CONDITIONAL USE PERMIT REQUIRED.* Adult businesses shall be permitted pursuant hereto only if,

(1) a conditional use permit therefor is first obtained; and

(2) the real property upon which use is proposed to be located, is classified, pursuant to the Whittier Zoning Regulations in Zones C-2, C-3 and M; and

(3) that the proposed location is not within 250 feet of any other real property which is classified in Zone R-E, R-1, R-2, R-3, or R-4; and

(4) that the proposed location is not within 500 feet of any other real property upon which there is located an adult business.

SECTION 3.That this Ordinance is hereby declared to be an urgency measure and shall take effect immediately upon its adoption. A statement of facts constituting the basis of such urgency is as above set forth. The legal authority for the enactment of this Ordinance is Section 65858 of the Planning Act of the State of California, and other applicable statutes.

SECTION 4. The City Clerk shall certify the adoption of this Ordinance and cause the same to be published in the manner prescribed by law.

PASSED and APPROVED this 21st day of June, 1977.

/S/ Jack Mele

JACK MELE, MAYOR

ATTEST:

/S/ Jenny Young

City Clerk

APPENDIX R

STAFF REPORT
AMENDMENT TO ZONING REGULATIONS
ADULT BUSINESSES IN C-2 ZONE WITH CONDITIONAL USE PERMIT
CASE NO. 353.015
JANUARY 9, 1978

Since 1969, beginning on Whittier Boulevard, easterly of the 605 Freeway, the community has experienced a rapid growth of adult businesses. Beginning in the unincorporated County area with an adult bookstore, the uses have expanded to include a theater, massage parlors, and model studios, and now stretch to the central business district of Whittier. Fifteen adult businesses now exist, thirteen of which are located in the City of Whittier.

On June 21, 1977, the City Council adopted Ordinance 2116, as an urgency measure, defining and regulating certain adult businesses through the conditional use permit process. The Council in the adoption of said ordinance declared that such uses have operational characteristics which may have a deleterious effect on immediately adjacent residential and commercial areas. The purpose of the urgency measure was to attempt to keep the situation status quo so that the issue could be studied and appropriate regulations, if necessary, be adopted in order to protect such commercial and residential areas within the City from the possible blighting or downgrading effect of adult business. Ordinance 2116 was amended on December 7, 1977 by Ordinance 2128 which added two uses to those regulated.

The urgency ordinance was modeled after an ordinance of Detroit, Michigan, which was upheld by the U. S. Supreme Court in June of 1976. Said ordinance dispersed such uses by use of separation distances from one another and from residential districts. Extensive

discussion of the Detroit Ordinance and others appears in the American Society of Planning Officials Report No. 327, "Regulating Sex Businesses," a copy of which is enclosed. (Copies furnished only to the City Council, Planning Commission, and the file. The file copy may be reviewed in the office of the Planning Department.)

EXISTING USES

Currently, there are adult businesses at the following locations:

Address	*Type of Business*
10529 Whittier Blvd.	Model studio
10555 Whittier Blvd.	Model studio
10619 Whittier Blvd.	Model studio
10703 Whittier Blvd.	Model studio
10705 Whittier Blvd.	Book store
10711 Whittier Blvd.	Model studio
10713 Whittier Blvd.	Massage parlor
10824 Whittier Blvd.	Massage parlor
11205 Whittier Blvd.	Massage parlor
11527 & 29 Whittier Blvd.	Model studio
11531 Whittier Blvd.	Book store
11729 Hadley	Massage parlor
7038 Greenleaf	Theater

The first of these, at 11729 Hadley Street, took out permits for partitions in January of 1969. The use of the building was stated as "physio-massage." Another massage parlor opened in 1976, at 11625 Hadley, but closed shortly thereafter. Several of the businesses have in these few years, changed hands and locations. At 10510 Dorland, a permit has been requested to convert an existing residence to a model studio, and is currently awaiting dedication of street right-of-way for issuance of permit.

STAFF STUDY

Since June 21, staff has been collecting and analyzing data and reviewing testimonies and contacting other agencies in efforts to determine what effect adult businesses have on adjacent properties. The one major factor to keep in mind in reviewing the data, however, is that not all of it can be isolated as being directly related only to the presence of adult businesses because of the variety of the factors influencing the study areas over the last ten years.

The study compared two areas on Whittier Boulevard over a ten-year period. Said areas are shown on the attached map. Area One, between Redman Avenue and Norwalk Boulevard, contains the largest concentration of adult businesses, the other, Area Four, easterly of Painter Avenue, between Jacmar and Watson Avenues, had no commercial frontage on Whittier Boulevard, and was used as a control. Area Four was selected because of its similar street patterns, lot sizes, and number of homes, to those of the first, where the adult businesses were concentrated.

The ten years compared were 1968 through 1977 (including some 1967 date where 1968 was not available). The first adult business on Whittier Boulevard was licensed on November 29, 1971, but the first in the study area appeared in 1973, and by late 1974, more than half of the current businesses were in operation. Therefore, the end of 1973 was selected as the date to be used to compare before and after affects.

The following is a summary of the results of the study, and indicates the factors considered:

	Study Area One		Study Area Four	
	Number	Per Cent	Number	Per Cent
1. Number of homes	160		175	
2. Number of businesses				
1967	17			
1976	19		0	
3. (a) Number of changes of occupant				
Homes	154	96	170	97
Business	37	205	0	
(b) Changes since 1973				
Homes	88	57	32	19
Business	17	46	0	
(Adult businesses)	(7)	(19)		
4. Number not changed				
Homes	67	41	79	45
Business	5	28	0	
5. Number of homes sold				
(a) At least once	46	28	79	45
(b) Since 1973	26	57	58	61
Average sale price				
1968	$19,100	7	$18,750	5
1969	17,000	2	19,000	6
1970	21,000	2	20,500	3
1971	25,400	5	20,000	3

1972	20,500	4	20,650	7
1973	21,500	2	20,500	9
1974	28,300	4	22,125	7
1975	26,100	7	26,000	9
1976	31,100	9	30,800	14
1977*	36,500	8	37,227	18

*Projected from 6 month data

6. Median Home Value
   (1970) $18,214 $18,280

7. Per cent owner occupied

1970	64	82
1977	84	85

8. Ages of housing 39 years 27 years

A further breakdown of the study area one, into the first and second blocks northerly of Whittier Boulevard reveals that the percentages in items 3, and 5 above, are slightly higher in the first blocks than in the second blocks by 5 to 15 per cent.

Item 3 (b), above, shows a major difference between study areas one and four of 36% (57 - 19) in number of changes in occupancy. Item 5 shows that the rate of sales of housing is about the same (57% - 61%), but item 7 shows that the owner occupancy rate has increased from 64% to 84% in study area one. This trend is supported by testimony at a recent public meeting, soliciting such information.

For business properties, the picture is more conclusive than for residential. Expanding items 3 and 4, above, in the business category, we find the following:

Number of changes in occupancy	since 1967	37
	since 1973	17
Number changing more than once	since 1967	12
	since 1973	4
Number not changing	since 1967	5
	since 1973	10
Number of changes to adult businesses		7

In addition to the above data, the annual vacancy rate dropped in 1976 to the level in 1966, having increased, to a peak of three and one-half times that level in 1972. It must be noted, however, that this apparent stability is due to the fact that adult businesses now occupy previously vacant buildings.

The Whittier Police Department has, during the last few years, been collecting evidence in efforts to eliminate alleged illegal activities from the adult businesses. As a result of these efforts, seven of the existing businesses are presently the subject of "red light abatement" action. The initial investigation and evidence gathering documented that all of the nude model studios and three of the massage parlors were actively involved in prostitution. Other problems created by the presence of these businesses are in the form of assault and battery and aggravated assault incidents. There have also been several thefts reported by the customers (johns) who are victimized by the employees. These individuals usually do not file complaints on the incidents, however, fearing that their spouses will become aware of their activities. Therefore, these incidents always do not appear on the police logs.

For several years, the Police Department has received complaints of excessive noise, pornographic material left

laying about and in some instances sexual offenders, such as exhibitionists, venting their sexual frustrations in the adjoining neighborhood. Another problem posed by the patrons of these adult businesses is the influx of drunk drivers and intoxicated persons. The majority of customers frequenting the business after 4:00 p.m., and until the early morning hours are males who have been drinking and are seeking sexual release. The Police Department has compiled from the daily logs for the two, four-year periods, 1970-1973 and 1974-1977, the number of incidents of 38 types of criminal activity and the data compared with the City as a whole.

This comparison revealed the following numbers of incidents in the given years:

1970 - 23	1974 - 57
1971 - 29	1975 - 73
1972 - 52	1976 - 90
1973 - 29	1977 - 49
1970-73 - 133	1974-77 269

The comparison of the totals of each four-year time period shows an increase of 102% in incidents of crime in the period 1974-77 over the period 1970-73, whereas, the City as a whole for the same period, experienced only an 8.3% increase in incidents of crime.

Some specific crimes increased in greater proportions as indicated in the following figures for slected crimes:

CRIME	1970-1973	1974-1977	% increase
All Assaults	8	39	387
Theft (Petty)	13	29	123
Robbery	8	13	63
Burglary (Residential)	15	23	53
Malicious Mischief	3	24	700

Prostitution	3	12	300
Grand Theft Auto	5	14	180
Theft (Grand)	4	9	125
Arson	0	5	
Displaying a Weapon	0	5	
Prowling	0	5	

Some crimes, on the other hand, decreased in frequency, such as felony narcotics, which decreased from 16 to 9, but due primarily to changes in narcotics laws. Eight other crimes decreased from one or two incidents in four years to zero to one incident in four years. Nineteen of the remaining types of crimes increased, while ten types were reported for the first time during the time period of 1974-1977.

At various public meetings, over the last several years, citizens have testified of being afraid to walk the streets, that some businesses have left the area or have modified their hours of operation, and that they are fearful of children being confronted by individuals of offensive character or of being exposed to sexually explicit material.

At a recent meeting, several of those who spoke, but lived some distance from the adult businesses, spoke on behalf of those who lived closer, but feared reprisals if they testified.

At one time, there was a general complaint from parents in the neighborhood that their minor children had been in possession of the negative portion of Polaroid film packs and although this image was not as clear as the positive portion, it clearly showed the lewd poses of the models working in the studios. Young males would rummage through the trash receptacles of the various businesses and pick up these items. It was

noted during Police Department investigation of the alleged prostitution activities at these nude model studios, that they had become aware of the complaints and refused to allow Polaroid cameras in the businesses. This did not, however, stop the problem of adult newspapers obtained at the book store being left strewn in the parking areas and alleys adjacent to the businesses.

Rates and numbers of changes of occupancy of residences and increases in complaints to the Police Department are the only measurable indicators of the moral and emotional impact of adult businesses on the surrounding neighborhood. This impact is, however, the most difficult to assess and is probably the most significant as it relates to the mental and physical well-being of the neighborhood and the City as a whole.

The health, welfare, and general prosperity of the community are some of those things which facts and figures cannot adequately describe, but the protection and furtherance of which is part of the stated purpose for the development of land use regulations.

An indication of the intensity of the moral and emotional impact is the unity of the residents and their willingness, through organizations, such as Citizens for Decency Through Law, to work for improvement of their neighborhood. This organization has been successful in eliciting support of other organizations to help in said efforts.

Aesthetics are a matter of personal preference, but plays an important role in effecting peoples' attitudes. Regulations, such as the sign ordinance, may not control content or colors of buildings or signs. Typically, the adult businesses are painted in garish, high contrast colors, utilizing flashing or moving lights to attract attention to the businesses. This technique is not,

however, unique to such businesses, but is quite common in marginal, strip commercial areas. It is noted that one other major strip commercial use, fast food restaurants, are beginning to change their images from the bright roofs, big signs and giant logos, to the softer, more contemporary, brick, wood, and tile, finding that their success does not depend entirely on their visibility. They have found that those who wish to avail themselves of the services offered will seek them out. The same philosophy could also be applied to adult businesses, allowing them to blend into other commercial neighborhoods.

Dispersion or Concentration

Two basic types of ordinances have been enacted by cities across the United States, dispersing or concentrating. In contrast to the Detroit ordinance, Boston created an "adult entertainment" district, concentrating adult businesses into what became known as the "combat zone." The purpose was to concentrate adult businesses into a single small area to prevent them from spreading into other areas of the City.

The Boston experience failed, however, because, according to Boston police and redevelopment spokesmen, "they (the property owners) killed the goose that laid the golden egg," by not policing themselves.

In Detroit, as in Boston, the problem was primarily in large downtown commercial districts and "skid rows." In these areas, adult entertainment businesses mingled with pawnshops, cheap hotels, bars, strip joints, etc., as well as the "non-porno" businesses. Property owners, attracted by the high rents, willingly paid by the adult businesses, eventually forced many legimate businesses to close, move, or go broke by increasing rents.

In the Hollywood area, as reported in several articles appearing in the *Los Angeles Times,* owners have stated that they don't particularly care for the type of business, but like the rent that will be paid by these businesses. This could be a major factor in low rent commercial areas. In the Hollywood area, the influx of adult businesses appears to have been followed by a higher vacancy rate. In West Whittier, however, the commercial area between Redman Avenue and Norwalk Boulevard, suffered from a higher vacancy rate before the commencement of adult businesses than after, but largely because adult businesses occupy those buildings which were most frequently found vacant. It could be expected that an owner of a vacant building would accept the high offers for rent with a good chance that the building would stay rented.

For the purpose of determining impact of concentration of adult businesses, four areas were compared, using Polk directories from 1967 to 1977 (1966 thru 76 information), to determine the rate of change of occupancy in adjacent residential neighborhoods before and after the introduction of adult businesses. Three of the surveyed areas contained adult businesses, the fourth, the control area, used for the entire study, included no commercial. Area one has six adult businesses, area two has one, and area three has three. The following map shows the areas studied. The results are as follows:

	Changes Per Year Before A.B.'s	Changes Per Year After A.B.'s
Area 1	9.4	22 (1974+)
Area 2	.1	.1 (1972+)
Area 3	5.3	11 (1974+)
Area 4 (Control)	20	11 (1974+)

Area 1, with a concentration of adult business by 1974, experienced a 134% increase in annual turnover rate, Area 2 experienced no measurable change, Area 3, with three businesses at one location, experienced a 107% increase. The control area, with no commercial and no adult businesses, experienced a 45% decrease in turnover rate for similar periods.

If dispersion is determined to be the most effective type of control (short of prohibition) to impose on such uses to protect adjacent properties, the question then becomes how much dispersion -- how much separation between related uses and from adjacent residential uses.

The Supreme Court in the Detroit case found no objection to the 1,000 ft. separation of "regulated businesses" and 500 feet from residential districts. As mentioned earlier, Detroit's ordinance was developed for a large downtown, with a skid row area. With the exception of Whittwood, the Quad, Uptown Whittier, and the industrial area, Whittier's commercial areas are strips of shallow commercial lots along Whittier Boulevard and intersections of major streets. Almost any separation between residential districts and adult businesses eliminates these businesses from the strip commercial areas, forcing them into Uptown or the shopping centers.

The issue of separation of adult businesses from schools, churches, parks, and similar public assembly areas, has also been raised and dealt with in ordinances of other municipalities. Currently, the closest adult businesses to any of these public uses is 470 ft. from a church, 300 ft. from a park, and 1,100 ft. from a school.

Any distance requirement must, however, be based on the relationship between distance and degree of impact. Brief discussion with the principal of Franklin

School and a representative of Whittier Presbyterian Church, revealed that neither had seen any evidence of direct impacts on their institution by the adult businesses. Both were very much aware of their presence, however, and the principal at Franklin School stated that several families who have moved from the area cited the presence of said businesses. One businessman who relocated to another area in the City, stated that the businesses were not a factor but that his clients now comment on the improvement.

The park referred to is McNees Park, at Whittier and Hadley, in the unincorporated County area. Whittier Police Department indicates that while the park is the scene of many arrests and source of many problems, no definite correlation can be made between the problems and its proximity to adult businesses.

Only one church is within the areas where the current urgency ordinance would allow adult businesses. Other churches are within 250 feet of the area uptown where such businesses could be located. Whittier High School is also within 250 ft. of allowable location in the M zoned area and St. Mary's parochial school is within 500 feet. Central Park (Bailey and Washington) is also within 250 feet of property eligible for the location of adult businesses.

Police records show that complaints of public drunkenness are more frequent in the areas around adult businesses where they are also in close proximity to bars and taverns which are not "bonafide eating places." There may, therefore, be reason to separate adult businesses from businesses with certain types of on-sale alcoholic beverage permits issued by the Alcoholic Beverage Control Board.

Churches, schools, and other public facilities are closed much of the time and do not present the opportunities which the parks do. The peak use hours of adult businesses are evenings, when schools, churches, and most public facilities are closed. Therefore, the effect on these uses would naturally be less than on uses which were all day uses, such as parks, or which, like residences, have evening and weekend "peak use" or enjoyment times. For these reasons, it may be in the community interest to require separation between adult businesses and parks. Five hundred feet should be considered a minimum separation, as this distance can be easily walked in less than five minutes. A thousand feet would require an individual to purposely set out to walk whereas 500 feet or under can be "wandered into."

Based solely on the study of one adult business, located almost in the midst of a residential neighborhood (area 2), and its effect on that neighborhood, it would appear that a 500 ft. separation from residential areas is adequate so long as the adult businesses are separated from one another to avoid concentration.

Adequate separation between adult businesses would also lessen the visual or aesthetic impact of concentrations such as businesses caused by their usual garish colors and flashing signs.

In addition to adult businesses, the Detroit ordinance included, when originally adopted as a skid row ordinance in 1962, as "regulated uses," Group "D" cabaret, establishments for the sale of beer or intoxicating liquor for consumption on the premises, hotels or motels, pawnshops, pool or billiard halls, public lodging houses, secondhand stores, shoeshine parlors, and taxi dance halls. Adult bookstores and adult theaters were added to this ordinance in 1972.

The Group "D" cabaret mentioned above is a topless or nude cabaret. Cabarets in the City of Whittier are currently regulated through a permit processed through the City Council. Other establishments for on-premise consumption of alcoholic beverages are currently regulated through the conditional use permit process. Pool or billiard halls, secondhand stores, and pawn shops, are permitted uses in the C-2 zones and by themselves present no evidence of any deleterious effect on adjacent properties. Shoeshine parlors and taxi dance halls are more or less unique to the skid row areas of the large cities and do not exist in Whittier nor are they expected to.

None of these uses are inherently attracted to one another, but all seem to be common to skid row areas. The skid row aspect of the Detroit ordinance has no bearing on Whittier's situation and staff cannot substantiate the need for any further regulation of those uses which are not classified as adult businesses.

In some areas, adult only motels and hotels have been established, featuring closed circuit TV showing pornographic movies as well as providing other "services," similar to the adult businesses discussed above. Staff feels that the likelihood of this type of business occurring in Whittier is not too great as these are more prevalent in areas of high transient traffic. Rather than attempt to define such a use in anticipation of its occurring, the proposed definition of adult businesses should provide adequate control over such a use.

Definitions

Defining an "adult business" is difficult, particularly when trying to separate them from other uses with similar names. The current urgency ordinance uses as its base,

the definitions which appear in the Detroit ordinance with minor modifications.

The key to the Detroit definitions is the "specified anatomical areas" and "sexual activities." However, such terminology is not immediately applicable to such uses as modeling studios, massage parlors, body painting studios, escort service, rap centers, and similar uses which utilize live humans for providing services. These uses differ from theaters and bookstores in that the latter uses reproductions of humans and the "specified anatomical areas" can be easily applied.

In defining individual adult businesses, the following have been used:

> "Adult Book Store" shall mean an establishment having as a substantial or significant portion of its stock in trade, material which is distinguished or characterized by its emphasis on matter depicting, describing, or relating to specified sexual activity or specified anatomical areas, or an establishment with a segment or section thereof devoted to the sale or display of such material.
>
> "Adult Business" shall mean and include an adult book store, adult theater, massage parlor, or modeling studio.
>
> "Adult Theater" shall mean a theater which presents live entertainment or motion pictures or slide photographs, which are distinguished or characterized by the emphasis on matter depicting, describing, or relating to specified sexual activity, or specified anatomical areas.
>
> "Massage Parlor" shall mean an establishment or business which is required to be licensed pursuant

to Section 6280 et seq of the Whittier Municipal Code.

"Material" shall mean, and include, but not be limited to, books, magazines, photographs, prints, drawings, or paintings, motion pictures, and pamphlets, or any combination thereof.

"Adult Modeling Studio" shall mean an establishment or business which provides the services of modeling for the purpose of reproducing the human body wholly or partially in the nude by means of photography, painting, sketching, drawing, or otherwise.

"Specified Anatomical Areas" shall mean:

(a) less than completely and opaquely covered:

(i) human genitals, pubic region;
(ii) buttock, and
(iii) female breast below a point immediately above the top of the areola; and

(b) human male genitals in a discernibly turgid state, even if completely and opaquely covered.

"Specified Sexual Activities" shall mean

(a) human genitals in a state of sexual stimulation or arousal; and/or

(b) acts of human masturbation, sexual stimulation or arousal; and/or

(c) fondling or other erotic touching of human genitals, pubic region, buttock, or female breast.

In the Detroit case, the phrase "distinguished or characterized by an emphasis on matter depicting. . ." was attached as vague. But, since there was no question in the Detroit case as to whether the material was "distinguished or characterized by an emphasis on matter depicting," the court did not rule on the vagueness of such a definition. A similar vagueness is found in the definition of adult bookstore where the phrase reads, "an establishment with a segment or section devoted to the sale or display of such material." The City's urgency ordinance narrows the vagueness some by using the phrase, "substantial or significant portion of its stock in trade . . . depicting. . . ." Such words as substantial, significant, distinguished by, segment and section usually require the courts to provide the narrowing.

A number of cities define adult businesses as:

> ". . .any business which is conducted exclusively for the patronage of adults, from the premises of which minors are specifically excluded, either by law or by the operation of such business."

Such a definition will generally encompass any use which the City is attempting to regulate and gets around the touchy question of content of material, relying on existing State and local regulations. These regulations are briefly discussed below.

The Whittier Municipal Code, Section 6288, prohibits giving a massage to or admitting any person under 18 years of age into a massage parlor unless parent or guardian has consented thereto in writing.

Minors are currently excluded specifically from adult bookstores and adult theaters by Section 313.1 of the Penal Code of the State of California because of the "harmful" content of the material available.

Section 309 of the Penal Code prohibits admitting minors into places of prostitution, but the law does not prohibit admitting a minor to view the physical body and photograph it for his own use. In this case, the exclusion is imposed by the management of the business who is not required by law to do so but does so out of fear of the possibility of being found guilty of contributing to the delinquency of a minor pursuant to Section 272 of the Penal Code.

The difficulty at this point in time with a general definition is that litigation is still pending on one such ordinance whereas the court has sanctioned, though on a 5 - 4 vote, the definitions contained in the Detroit ordinance.

The two types of definitions can, however, be used together. The severability clause (Section 9105) of the zoning regulations would protect one definition if the other was ruled against by the court. If the courts should rule in favor of the general definition, then the ordinance is that much stronger and accomplishes the overall goal of regulating existing and future adult business uses and eliminates the need for defining every possible business which might be conjured up.

Control

Assuming the dispersion approach is the most acceptable, two methods are available as alternatives to determining where adult businesses can be located. The first is to permit them by right in given zones, with the locational criteria. The second is to require approval through a permit process of some kind. The conditional use permit is the only tool available to the City for this type of control.

By allowing the use to be established by right, the City relinquishes control over the use other than through

enforcement of criteria which might be established. Such regulation fails to take into account special circumstances relative to a specific location, on which adult businesses might have impact. The conditional use permit process allows staff and Planning Commission to review each request and requires the applicant to show that the use will not have an adverse impact on the area and that there is a demonstrated need for the use at that location.

The question remaining then is which zone is appropriate. Being a commercial use, an adult business would be limited to one of the C zones or the M zone. The C-0 zone is intended for offices and uses which service offices or employees of office type uses, such as beauty and barber shops. The C-0 zone, as well as the C-1 zone, act somewhat as transitional or buffer zones, often separating heavier C-2 zones from residential zones and allowing residential uses as as well. Adult businesses in the C-0 and C-1 zones would not be able to meet any reasonable separation criteria. The C-2 zones, though often separated from residential districts by C-0 and C-1 zones are not ideal either because of their proximity to residential uses and the shallow depths of most C-2 zoning which makes meeting separation criteria difficult.

The courts have said that restrictions on a legal business cannot be such that the effect is elimination or prohibition of such uses. First permitting adult businesses in the C-2 zone would provide reasonable flexibility through the conditional use permit process for the approval of a limited number of adult businesses in several areas of the City.

Abatement of Nonconforming Uses

It is quite obvious that any requirement for separation from residential areas and between businesses will have the effect of making all of existing adult businesses, with the exception of the theater Uptown, nonconforming uses, subject to abatement.

The courts have held that reasonable time must be given in the amortization of nonconforming uses. Such time limits must commensurate with investment involved and based on the nature of the use.

The improvement made to structures in which existing adult businesses are located were basically partitioning and signs. The valuation listed on the permits ranged from (total of all permits on property) $1,000 to $12,450, averaging $3,185 per adult business. Three locations apparently had no modifications which required building permits. The permit fees amounted to a total of $572.95, averaging $47.75 per business. One case of high valuation and permits resulted from the repair to a structure after extensive fire damage. These amounts are not, in staff's opinion, significant investments for the use, and on the high rate of return on adult business investments any costs should have been amortized several times.

The courts in 1974 upheld an 18-month amortization of a use declared a public nuisance, where users had no investment in any permanent improvements on the property and where users had adequate time to make plans to move and where there was substantial evidence that there was adequate properties favorably zoned in the county which could be used to locate the business.

A reasonable amortization should not be less than 18 months nor need be longer than two or three years. Where the conformity only requires a change in the stock in trade, such as books or a change in the material

presented as in a theater, the amortization period can be shorter. The proposed ordinance would provide 90 days in this case.

Conclusion

The information obtained and reviewed during the conduct of this study has definitely shown that concentration of adult businesses in the City of Whittier have had an adverse impact on the adjacent neighborhoods. The increases in crime and residential occupancy turnover are two of the key indications of neighborhoods beginning to decline and deteriorate. The City's intent in regulating such businesses is to prevent them from causing deterioration in adjacent neighborhoods. Assuming that such regulation, now pending is timely, that is, not too late, some of the more physical evidences of deterioration are not blatantly evident. However, experiences of other municipalities and of individuals support the impact of prolonged concentration of such businesses.

Inasmuch as the courts have prevented the outright prohibition of adult businesses, regulation is the only control left to the cities. It is evident from the study that individual, isolated businesses do not have nearly as great an impact as concentrations.

Therefore, the dispersion of adult business in certain areas of the City is the most appropriate form of regulation, using the conditional use permit process to review each application.

The Supreme Court has upheld 1,000 foot and 500 foot separations in the Detroit case. These separations are adequate for Whittier's situation. In certain circumstances, lesser separation would accomplish the same end, but structuring an ordinance with specific areas complicates its enforcement.

The effect of such separation would make portions of the industrial areas and shopping centers eligible locations for adult businesses, subject to conditional use permit approval.

All of the existing locations of adult businesses would become nonconforming under the provision of the proposed ordinance and required to conform within the prescribed abatement periods.

Recommendation

Staff recommends that the Planning Commission recommend that the City Council find that the regulation of adult businesses is required for the preservation of the integrity of existing commercial area and residential areas in close proximity thereto and is in the public interest and would promote the general welfare of the community and that the attached draft ordinance regulating such businesses be adopted.

(Considered by Whittier City Planning Commission, January 9, 1978 and Whittier City Council January 24, 1978)